O/a 10-31-86

IN THE SUPREME COURT OF THE

STATE OF FLORIDA

SUPREME COURT CASE NO: 68, 421

Joseph Charles Craft

~~ANDREW LAWRENCE YOUNG, et al.~~,

Petitioners,

vs.

STATE OF FLORIDA,

Respondent.

ANSWER BRIEF ON THE MERITS

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ISSUES PRESENTED

I

THE FAILURE OF LAW ENFORCEMENT OFFICERS TO GIVE THE WARNING REQUIRED BY FLA. STAT. 316.1932 (1983) ABOUT A SUSPECT'S RIGHT TO REFUSE A BREATH TEST FOR BLOOD ALCOHOL IS NOT A PREREQUISITE TO THE ADMISSIBILITY OF THE TEST GIVEN AFTER THE SUSPECT DOES NOT REFUSE TO TAKE THE TEST.

II

THERE IS NO SUBSTANTIAL COMPETENT EVIDENCE TO SUSTAIN THE FINDING OF THE TRIAL COURT THAT THE LAW ENFORCEMENT OFFICERS IN THIS CASE FAILED TO ADVISE THE PETITIONERS OF THEIR RIGHT TO REFUSE THE BREATH TEST FOR BLOOD ALCOHOL UNDER THE REQUIREMENTS OF FLA. STAT. 316.1932 (1983).

III

NO PRINCIPLE OF CONSTITUTIONAL, STATUTORY, OR DECISIONAL LAW REQUIRES THAT A SUSPECT FREELY AND VOLUNTARILY CONSENT TO SUBMIT TO CHEMICAL TESTS FOR BLOOD ALCOHOL.

IV

THERE IS NO SUBSTANTIAL COMPETENT EVIDENCE TO SUSTAIN A FINDING THAT THE WARNING GIVEN PETITIONERS MISLED THEM IN ANY WAY ASSUMING *ARGUENDO* THE LAW REQUIRES THAT THEY FREELY AND VOLUNTARILY CONSENT TO SUBMISSION.

SUMMARY OF ARGUMENT

Respondent argues that failure to give the statutory warning about the penalty for refusal of a breath test is not a prerequisite to the admissibility of the test results as evidence, but only a prerequisite to the imposition of the statutory penalty of suspension of driving privileges. Respondent argues that this court should approve the reasoning of Pardo v. State, 429 So2d 1313 (Fla. 5th DCA 1983), and the decision of the district court of appeal sub judice. Respondent reasons that Pardo sanctions the admissibility of the test results when no warning is given; therefore, any warning, no matter how incorrect, cannot bar admissibility of the test results.

Respondent argues that the law enforcement officers in this case did not fail to advise the petitioners of the penalty for refusal of the breath test, and therefore, they fulfilled the statutory requirement. Neither Fla. Stat. 316.1932 (1983) nor Fla. Stat. 322.261 (1983) requires a law enforcement officer to advise a suspect of his right to refuse, but only requires a law enforcement officer advise of the penalty for refusal.

No principle of constitutional, statutory, or decisional law requires that a suspect freely and voluntarily consent to submit to chemical tests for blood alcohol. Petitioners argue that consent must be obtained freely and voluntarily, however, respondent disagrees and argues that there is no constitutional

provision that limits the power of the state to administer these tests, therefore, their administration and admissibility is governed by statute. No statute prohibits the admissibility of the results in evidence under the circumstances of this case.

No substantial competent evidence sustains a finding that the warning given the petitioners in this case misled them in any way assuming that submission must be freely and voluntarily given. The warning is not misleading *per se* when considered by men of common intelligence and reason, nor did the petitioners offer any evidence that the warning misled them.

ARGUMENT

ISSUE I

Respondent takes the position that the results of a breath test for blood alcohol are admissible whether or not the law enforcement officer who administered the test failed to advise the suspect concerning the consequences of his refusal to submit to the test.

Fla. Stat. 316.1932 requires that a law enforcement officer administering a breath test for blood alcohol advise the suspect as follows:

> "Such a person shall be told that his failure to submit to a breath test or urine test, or both such tests, will result in the suspension of his privilege to operate a motor vehicle for a period of six (6) months, for first refusal, or for a period of one (1) year if the driving privilege of such person has been previously suspended as a result of refusal to submit to such a test or tests."

There is no statutory obligation placed on the law enforcement officer administering the test to advise the defendant that he has the right to refuse the test, but the statute only places an obligation upon the law enforcement officer to advise the suspect of the consequences of his failure to submit to such a test. The consequences of the failure to submit are set forth in Fla. Stat. 322.261 (1983) which provides for the suspension of driving privileges for specified periods upon the refusal to submit to the test. The state argues that the failure of a law enforcement officer to properly advise a suspect in accordance with Fla. Stat. 316.1932 does not affect the admissibility of the results of

the test when the suspect does not refuse to submit, but only affects the imposition of the penalty of suspension of driving privileges for such refusal under Fla. Stat. 322.261 (1983). Appellant argues that this court should adopt the reasoning of Pardo v. State, 429 So2d 1313 (Fla. 5th DCA 1983). In Pardo, a defendant had been arrested and charged with manslaughter while driving while intoxicated. After his arrest, the law enforcement officers did not tell him that failure to submit to a chemical test could result in the suspension of his driving privileges. The officers took a blood specimen without the suspect's objection. (Fla. Stat. 316.1932(1)(c) requires law enforcement officers to tell the accused the same thing prior to the administration of a blood test as prior to the administration of a breath test under Fla. Stat. 316.1932(1)(a)). In Pardo the trial court denied a motion to supress the results of the blood alcohol test and admitted the results of the test into evidence. After conviction, the appellate court determined the issue to be whether or not the failure of law enforcement officers to inform the defendant of the consequences of his failure to submit to the chemical test would result in a suspension rendered the results of the test inadmissible as evidence in a subsequent prosecution. The appellate court affirmed holding that the failure to advise the defendant of the consequences of failing to submit to the chemical tests for blood alcohol was not a prerequisite to the

admissibility of the results of the test in a subsequent prosecution, but was only a prerequisite to the imposition of the penalty of suspension of driving privileges for refusal to submit to the blood alcohol test.

Appellant argues that Pardo accurately assesses and applies legislative intent when Fla. Stat. 316.1932 (1983) and Fla. Stat. 322.261 (1983) are read together.

ISSUE II

Respondent argues that there is no substantial competent evidence to sustain the finding that the law enforcement officers in this case failed to give the statutory warning. The recitation of the warning in this case is as follows:

> "You do not have a right to refuse to take the test, but if you do refuse your license will be suspended for a period of six (6) months or one (1) year if you have refused before. Do you understand what I have just read?"

The statute only requires that the law enforcement officer advise the suspect of the penalty for refusal to submit to the test. The law enforcement officers in this case fulfilled that requirement. Fla. Stat. 316.1932 (1983) and Fla. Stat. 322.261 (1983). The law enforcement officers, therefore, did not fail to comply with the statute in this case.

ISSUE III

Respondent argues that no law requires that a suspect freely and voluntarily consent before the state administers a chemical test for blood alcohol. The consent to submit to a test for blood alcohol cannot as a matter of law under existing statutes and constitutional construction be characterized as freely and voluntarily given. The legislature coerces submission to these tests in three ways. First, the legislature coerces submission to these tests in exchange for granting its citizens the privilege to drive. (Fla. Stat. 316.1932(1)(a) 1983). The legislature does not call for volunteers among its citizens to consent to these tests for the safety of all. The statute withholds the privilege of driving from a citizen who does not consent. This is not free and voluntary consent. If he does not consent, he does not drive.

Second, the legislature coerces submission to these tests by imposing a specific penalty upon any driver who refuses. The plain purpose of the imposition of a penalty for refusal is to coerce submission to the test. Fla. Stat. 316.1932(1)(a) and Fla. Stat. 322.261 (1983).

Third, the legislature requires that a law enforcement officer advise a suspect of the penalties for refusing a chemical test for blood alcohol at the time of the alleged offense and at the time of the administration of the test.

The warning at that time and under those circumstances can only be designed to coerce submission. Fla. Stat. 316.1932(1)(a).

The constitution of the United States does not limit the power of the state to administer these tests. Schmerber v. California, 384 US 757, 86 S.Ct. 1926, 16 L. Ed. 2nd 908 (1966). Since there is no constitutional prohibition, respondent argues that the statutes govern the administration of these tests and the admissibility of the results.

Respondent perceives that petitioners adopt an extremist philosophical position of civil libertarians. Petitioners don't like the state interfering with their freedom to do as they please. However, respondent perceives this argument to be fundamentally faulty for the reason that this court must balance the interest of the citizen to be free to do as he pleases and the interest of the state to protect the health, safety and welfare of its citizens. The state coerces its citizens to conform to a code of conduct for the safety of all in innumberable ways that are part of daily life. The state coerces its citizens to drive on the righthand side of the road, obey traffic control devices, and have specified safety devices in their automobiles. The most important safety device in any car is a sober, competent driver. Respondent argues that it is well within the police power of the state to coerce its citizens accordingly. Automobiles are necessary, but they pose a great danger to all. The state must carefully govern their ownership and operation.

Respondent views these tests as an important protection of the civil liberties of its citizenry. The state provides these tests at great expense and views these tests as a significant protection from wrongful arrest and prosecution for drunk driving afforded the citizenry.

Respondent concludes, therefore, that there is no principle of constitutional, statutory, or decisional law that prohibits the state from administering chemical tests for blood alcohol or which prohibits the courts from accepting the results as evidence. Should the legislature desire to prohibit the introduction of the results as evidence under any circumstances, it can enact a statute enumerating them.

ISSUE IV

Respondent argues that there is no substantial competent evidence to sustain any finding that the warning given in this case misled any of the petitioners assuming _arguendo_ that the court rules that consent to chemical tests for blood alcohol must be freely and voluntarily given.

Respondent reasons that any individual of common intelligence and reason after hearing the warning administered to him by the law enforcement officers in this case would know that he could refuse the breath test and specifically what penalty he would suffer for such refusal. Respondent concludes therefore, that the warning in this case is not misleading _per se_.

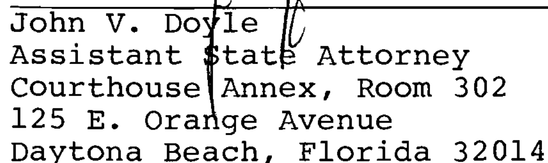
Respondent reasons that there is no substantial competent evidence to sustain any finding that the warning misled petitioners. Petitioners offered no evidence that they were misled. The warning itself constituted the only evidence before the trial court. Respondent concludes, therefore, there is no substantial competent evidence to sustain any finding that the warning misled the petitioners.

CONCLUSION

Respondent concludes that the failure to give any warning or a proper warning of the penalties is not a prerequisite to the admissibility of a chemical breath test for blood alcohol; there is no substantial competent evidence to sustain any finding that officers in this case failed to give the proper statutory warning; no law requires a suspect freely and voluntarily consent to submit to a chemical test for blood alcohol; and that there is no substantial competent evidence to sustain any finding that the warning in this case misled petitioners. Respondents request that this court adopt the opinion and reasoning of the district court.

Respectfully submitted,

STEPHEN L. BOYLES
STATE ATTORNEY



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I hereby certify that a copy of the foregoing has been furnished by U. S. Mail to Eric Latinsky, Esquire, 326 1/2 S. Beach Street, Suite 7, Daytona Beach, FL 32014, and Michael H. Lambert, Esq., 630 N. Wild Olive Avenue, Suite A, Daytona Beach, FL 32018, this 19 day of August, 1986.

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