D/a 10-31-86

SUPREME COURT OF FLORIDA

CASE NO. 68,421

DISTRICT COURT OF APPEAL,
FIFTH DISTRICT - NOS. 85-1395
85-1396
85-1397
85-1399

Craft

ANDREW LAWRENCE YOUNG,
JAMES ALLEN TAYLOR,
WILLIE RAY BURTON, and
MICHAEL FRANCHINI,

Petitioners,

VS.

STATE OF FLORIDA,

Respondent.

PETITIONERS' INITIAL BRIEF

Respectfully Submitted,

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Attorney for the Petitioners

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CITATION OF AUTHORITY

(CASES CITED)

(OTHER AUTHORITIES)

SUMMARY OF ARGUMENT

In all cases on Appeal a police officer told the Petitioners that he or she had no right to refuse to take a chemical test of the breath to determine the alcoholic content of his or her blood. The statement of law was incorrect, imporper and misleading in that each Petitioner did have a statutory right to refuse to submit as was clearly stated in this Court's prior decision in Sambrine v. State, 386 So 2d 546 (1980). The Trial Court correctly ruled that test results obtained through the taking of evidence from a person's body after giving misleading, improper and wrong warnings in violation of statutory rights granted by the Florida legislature should be suppressed.

STATEMENT OF FACTS AND CASE

Each of the Defendants were unlawfully arrested for the offense of Driving While Under The Influence of Alcoholic Beverages To The Extent His Normal Faculties Were Impaired. Each Defendant was transported to the Daytona Beach Police Department and, in an effort to follow Florida Statute 316.1932 (1984). was informed

> "I am prepared to give you an approved chemical test of your breath to determine the alcoholic content of your blood; you do not have the right to refuse to take the test, but if you do refuse your license will be suspended for a period of six months, or one year if you have refused before."

Based upon that statement to each of the Defendants, they submitted to a chemical breath test to determine their blood alcohol content. Each of the Defendants thereafter filed a Motion To Suppress the results of the chemical breath test administered to them, and as the issue was common to all six Defendants their cases were consolidated for a singular hearing.

Volusia County Judge Norton Josephson granted the Defendant's Motion To Suppress stating that the evidence taken from each of these individuals was done under a misleading, improper and wrong warning in violation of statutory rights granted by the Florida Legislature. The State of Florida timely appealed the Order suppressing the results of the chemical breath test and Circuit Court Judge C. McFerrin Smith, III "reluctantly" affirmed. The State of Florida next appealed to the Fifth

District Court of Appeals which reversed the Circuit and County Court decision stating that there does not exist a right to refuse a chemical breath test and that the decisions relied upon by the Volusia County Court and the Circuit Court were misinterpretted. A timely appeal to this Court followed.

ISSUE I

THE IMPLIED CONSENT WARNING READ BY THE DAYTONA BEACH POLICE OFFICERS TO EACH OF THE DEFENDANTS HEREIN IS MISLEADING, INACCURATE AND WRONG, AND THEREFORE THE RESULTS OF THE CHEMICAL BREATH TEST ADMINISTERED TO THEM SHOULD BE SUPPRESSED.

The determination of the Issue presented above can easily be resolved by merely following the decision of the United States Supreme Court, the Courts of this State of Florida, and the Florida Legislature. In Schmerber v. California, 384 U.S. 757, 16 L.Ed 2d 908, 86 S.Ct 1826, the Supreme Court of the United States announced that law enforcement may, or probable cause exist to believe that an alcohol related vehicular offense has occurred may forcibly withdraw blood from an arrested individual to determine his blood alcohol content. This personal invasion to secure evidence is still upheld. The Florida Legislature though, has extended to its citizens protections greater than those afforded under the Constitution of the United States via its enactment of Florida Statute 322.261 (1975). Under that statutory provision anyone stopped for Driving Under The Influence Of Alcoholic Beverages is given the right to refuse to submit to a chemical breath test. The exercise of that right; however, is not without sanctions.

The first Court called upon to interpret former

Florida Statute 322.261(1)(a), now Florida Statute 316.1932, was State v. Duke, 378 So 2d 96 (2d D.C.A. 1979). That Court determined that "you do not have the right to refuse to take a chemical breath test." Apparently the legal advisor for the Daytona Beach Police Department failed to Shepardize that case to determine that in 1982, in Duckworth v. State, 408 So 2d 589 (2d D.C.A. 1982) Duke was reversed. The Duckworth opinion relied heavily upon this Court's case of Sambrine v. State, 386 So 2d 546 (F.S.Ct. 1980), wherein this Court in no uncertain terms stated, "any careful reading of Section 322.261 leads to the inescapable conclusion that a person is given the right to refuse testing." (at Pg-548). In an effort to simplify Florida Statute, 322.261 (1975), this Court additionally stated, "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 chemical test will result in a three month suspension."

What law enforcement has done in this case was not to inform that there was a right to refuse; however, but to erroneously, unlawfully, illegally, inaccurately, and incorrectly told each of these individuals that they "did not have a right to refuse." The simplest way to accommodate the statute and its purpose is but to query an arrestee as to whether or not he will submit to a chemical breath test. If he refuses inform him of the consequences. If he agrees offer the test.

The opinion of the Fifth District Court of Appeals in this case quite bluntly states that this Court did not mean what

it said in Sambrine and that the inaccurate, misleading, unlawful explanation given to these individuals by the Daytona Beach Police Department only secured evidence that they were entitled to get anyway. This interpretation begs and ignores the issue presented.

There is no dispute that the coupling of alcohol ingestion and the operation of a motor vehicle is rampant in this State and has caused countless tragedies; however, we are not to look at the consequences but to follow the law that has been given to us and to provide a system within which the laws, as stated are enforced equally.

CONCLUSION

The Implied Consent warning read to each of these individuals was improper, misleading, inaccurate and wrong and therefore the chemical breath test secured as a result thereof should be suppressed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by mail to the Honorable John Doyle, Assistant State Attorney, 125 E. Orange Avenue, Daytona Beach, Florida; Eric A. Latinsky, Esquire, 326 1/2 South Beach Street, Suite 3, Daytona Beach, Florida; and Honorable Frank Habershaw, Clerk of the Fifth District Court of Appeals, 300 South Beach Street, Daytona Beach, Florida, this 18th day of July, A.D., 1986.

MICHAEL H. LAMBERT, P.A.