O/a 10-31-86

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IN THE SUPREME COURT OF THE
STATE OF FLORIDA

CASE NO: 68,421

JOSEPH CHARLES CRAFT and
SANDRA SHIPLEY PARNELL,

Petitioners,

vs.

STATE OF FLORIDA,

Respondent.

_____/

# INITIAL BRIEF OF PETITIONERS CRAFT AND PARNELL

ON APPEAL FROM THE
FIFTH DISTRICT COURT OF APPEAL
DCA CASE NOS: 85-1398 and 85-1400
(consolidated)

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## TABLE OF AUTHORITIES

## PRELIMINARY STATEMENT

For the purposes of this appeal Joseph Charles Craft and Sandra Shipley Parnell shall be referred to as the "Petitioners". The State of Florida shall be referred to as "Respondent."

The appendix will be referred to by the abbreviation "A" followed by the appropriate page number.

The record on appeal will be referred to by the abbreviation "R" followed by appropriate page number. (At the time this brief was prepared the record on appeal had not yet been prepared).

## 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, improper and misleading in that each Petitioner did have a statutory right to refuse to submit as was clearly stated in this Court's prior decisions in Smith v. State, 378 So.2d 281 (Fla.1978) and Sambrine v. State, 386 So.2d 546 (Fla.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. In these cases the Petitioners did not knowingly and voluntarily submit to the chemical test and the results were properly suppressed by the County Court.

## STATEMENT OF THE CASE AND FACTS

Petitioners, Craft and Parnell, are two of seven defendants charged with Driving Under the Influence of Alcoholic Beverages under Florida Statute 316.193. Each of the Petitioners filed a Motion to Suppress in the County Court pertaining to the results of breath tests administered by the police department of the City of Daytona Beach.

Each Petitioner was read a card by the law enforcement officers who requested the Petitioner to submit to a breath test. The card stated:

> "I am prepared to give you an approved chemical test of your breath for the purpose of determining the alcohol content of your blood;You do not have a right to refuse to take the test; But if you do refuse, your drivers license will be suspended for a period of 6 months, or 1 year if you have refused before." (Emphasis supplied).
>
> (A- 2 ).

The Petitioners' Motions to Suppress were consolidated for hearing on August 31, 1984. The County Court granted the Motion to Suppress finding that the Daytona Beach Police Department in the above styled causes improperly advised the defendants that they did not have the right to refuse to take the chemical test contrary to Section 316.1932, Florida Statutes. (A- 5 ).

The State of Florida appealed the ruling of the County

Court to the Circuit Court. The Circuit Court specifically noted the "illogic of Duckworth". (Duckworth v. State, 408 So.2d 589 (Fla.2DCA 1982) but followed the existing precedent and affirmed the trial court in its opinion filed August 15, 1985. (A -8 ).

On December 26, 1985, the Fifth District Court of Appeal issued a Writ of Certiorari finding that:

> The circuit court should have reversed the order suppressing the results of the blood tests, and in failing to do so departed from the essential requirements of law. We therefore grant the petition, quash the order of the circuit court, and remand the cause to the circuit court for further proceedings consistent herewith.
>
> (A- 16 ).

A timely Motion for Rehearing was filed in the Fifth District Court of Appeal. (A- 18). Petitioners' Motion for Rehearing was denied on January 31, 1986. (A- 23). On February 28, 1986, Petitioners timely filed a Notice to Invoke Discretionary Jurisdiction of the Florida Supreme Court. This court accepted jurisdiction in this cause on June 24, 1986.

## ISSUE I

THE COUNTY COURT CORRECTLY SUPPRESSED THE RESULTS OF A CHEMICAL BREATH TEST OBTAINED AFTER LAW ENFORCEMENT OFFICERS AFFIRMATIVELY MISSTATED THE APPLICABLE FLORIDA LAW.

In these cases the County Court correctly ruled that:

> It is doubtful that the Supreme Court of the United States or even the Fifth District Court of Appeals of the State of Florida or the Second District Court of Appeals of Florida would condone the taking of evidence from a person's body under misleading, improper and wrong warnings and in violation of statutory rights granted by the Florida legislature.
>
> This leads this Court to the inescapable conclusion that the results of the chemical test performed upon these defendants should be suppressed.
>
> (A- 7 ).

However the Circuit Court correctly predicted that the Fifth District Court of Appeal would overturn the ruling stating:

> The trial court placed great reliance on Ducksworth v. State, 408 So.2d 589 (2nd DCA Fla. 1982), and State v. Williams, 417 So.2d 755 (5th DCA Fla. 1982) to find that the warning given by Daytona Beach Police Officers to the various defendants was misleading, improper, and wrong, and in violation of statutory rights granted by the Florida Legislature. Further, the trial court predicted that neither the United States Supreme Court nor the Fifth District Court of Appeal would condone the taking of evidence from a

> person's body under these misleading circumstances. The learned trial judge has too little confidence in the 5th DCA.

The prior decisions of this Court in Sambrine v. State, 386 So.2d 546 (Fla.1980) stating that a person is given the right to refuse testing and Smith v. State, 378 So.2d 281 (Fla.1979) in which this Court examined the record to determine whether consent to the breathalyzer test was freely and voluntarily given are highly supportive of Petitioners' position in this matter. However the Fifth District Court of Appeal specifically found that the County Court read the Sambrine decision to literally. The Fifth District Court of Appeal did not mention Smith in their decision.

The Sambrine decision is quite clear on its face. The Court stated at applicable section:

> The state asserts that said consent is not material where the blood test is taken incidental to a lawful arrest and where there is probable cause to take a blood test coupled with exigent circumstances. It contends that section 322.261(1)(a) is inapplicable in the instant case and that the administration of the test should be judged on constitutional principles. The state ignores section 322.261(1)(c). This Court is not free to ignore plain statutory language and obvious legislative intent. Any careful reading of section 322.261 leads to the inescapable conclusion that a person is given the right to refuse testing. If this were not so, it is unclear why the legislature provided for a definite sanction

> and a detailed procedure for the enforcement of such action. (Emphasis supplied)
>
> Id. at 548

Despite the clear and unequivocal language of Sambrine, the Circuit Court and Fifth District Court of Appeal each attempted to distinguish the case. The Circuit Court referred to the language as a "dicta" stating:

> "In Sambrine v. State, 386 So.2d 546 (Fla. 1980), the Supreme Court unfortunately announced dicta that a person has the "right" to refuse a breathalyzer. The 2nd DCA in Ducksworth, supra, compounded the problem by accepting the Sambrine dicta as the Supreme Court's holding and receding from its previous holding in State v. Duke, 378 So.2d 96 (2nd DCA Fla. 1979)."
>
> (A- 8 )

The Fifth District Court of Appeal distinguished Sambrine stating:

> From this quoted language in Sambrine, and from other expressions in the same opinion discussing the "right to refuse testing," the county court concluded that a driver who was arrested for driving while intoxicated did have a legal right to refuse the breath test, hence the instruction given by the officers in this case was misleading and improper as a matter of law. We believe the county court read Sambrine too literally, and we conclude that the supreme court did not intend the meaning the county court ascribed to it.
>
> (A-14 ).

The Sambrine decision was not the first time this Court

had referred to a right to refuse. In Smith v. State, at footnote 4, this court stated:

> 4. Riggins correctly points out that a person's right to refuse a chemical test in Florida is a statutory rather than a constitutional right. Federal and Florida cases have concluded that the taking of a blood sample from an arrestee involved in an automobile accident who appears to be under the influence of alcohol is constitutional. Schmerber v. California, 384 U. S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966); Filmon v. State, 336 So.2d 586 (Fla.1976); State v. Mitchell, 245 So.2d 618 (Fla.1971).
>
> Smith, supra, at 283

It is clear that a right to refuse chemical testing has been noted by the Florida Supreme Court in its prior opinions. It is interesting to note that the State conceded this point in the Circuit Court stating:

> Appellant agrees that the Appellees in this case had the right to refuse to submit to the breath test. However, the Appellees did not refuse and submitted to the test. The tests were not administered to the Appellees in spite of their refusal, therefore, the holding in Sambrine does not control the facts of this case. (Emphasis supplied).
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> (A- 17 )

A review of the statutory scheme indicates this Court was correct in acknowledging a right to refuse testing.

Certain of the applicable sections of Florida law have been renumbered. Section 316.1932(1)(a), Florida Statutes

(1983) states:

> Any person who accepts the privilege extended by the laws of this state of operating a motor vehicle within this state shall, by so operating such vehicle, be deemed to have given his consent to submit to an approved chemical test of his breath for the pupose of determining the alcoholic content of his blood, and to a urine test for the purpose of detecting the presence of controlled substances, if he is lawfully arrested for any offense allegedly committed while the person was driving or was in actual physical control of a motor vehicle while under the influence of alcoholic beverages or controlled substances. The breath test shall be incidental to a lawful arrest and administered at the request of a law enforcement officer who has reasonable cause to believe such person was driving or was in actual physical control of the motor vehicle within this state while under the influence of alcoholic beverages. The urine test shall be incidental to a lawful arrest and administered at a detention facility or any other facility, mobile or otherwise, which is equiped to administer such tests at the request of a law enforcement officer who has reasonable cause to believe such person was driving or was in actual physical control of a motor vehicle within this state while under the influence of controlled substances. The urine test shall be administered at a detention facility or any other facility, mobile or otherwise, which is equiped to administer such tests in a reasonable manner that will ensure the accuracy of the specimen and maintain the privacy of the individual involved. The administration of either test shall not preclude the administration of the other test. Such person shall be told that his failure to submit to such 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 6 months for a first refusal, or for a period of 1 year if the driving privilege of such person has been previously suspended as a result of a refusal to submit to such a test or tests. The refusal to submit to a chemical breath or urine test upon the request of a

> law enforcement officer as provided in this section shall be admissible into evidence in any criminal proceeding.

In State v. Bender, 382 So.2d 697 (Fla.1980) this Court upheld the constitutionality of Florida Statute 322.261 and 322.262 (1971). This Court held in Bender that test results are admissible into evidence only upon compliance with the statutory provisions and the administrative rules. The Court specifically noted that the implied consent provisions of Chapter 322, the approved testing methods, and presumptions were all interrelated. Bender at 699.

322.261, Florida Statutes (1983) stated:

> 322.261 **Suspension of license for refusal to submit to test for impairment or intoxication.--**
>
> (1) If any person refuses an officer's request to submit to any breath, urine, or blood test provided in s. 316.1932, the department, upon receipt of the officer's sworn statement that he had reasonable cause to believe such person had been driving or had been in actual physical control of a motor vehicle within the state while under the influence of alcoholic beverages or controlled substances and that the person had refused to submit to such test or tests after being requested by the officer, shall suspend his privilege to operate a motor vehicle for a period of 6 months. If the driving privilege of such person has been previously suspended for refusing to submit to such test or tests, the department shall suspend his privilege to operate a motor vehilcle for a period of 1 year. No suspension shall become effective until 10 days after the giving of written notice thereof, as provided for in subsection (2).
>
> (2) The department shall immediately send notification to such person, in writing by certified mail to his last known address

furnished to the department, of the action taken and of his right to petition for hearing as hereinafter provided and to be represented at the hearing by legal counsel. Such mailing by the department will constitute notification as required by this section, and any failure by the person to receive such notification will not affect or stay such suspension order.

(3) Upon his petition in writing, a copy of which he shall forward to the department, being filed within 10 days from the date of receipt of the notice, directed to the court having trial jurisdiction of the offense for which he stands charged, such person shall be afforded an opportunity for a hearing at a time to be set by the court, which hearing date shall be within 20 days of the filing of the petition with the court. It is the responsibility of the clerk of the court to schedule the hearing and to give proper notice to the petition and to the state attorney. If the person fails to appear for the hearing, the clerk of the court shall immediately notify the department, which shall suspend the person's license for a period of 6 months, or a period of 1 year if the driving privilege of such person has been previously suspended for a refusal to submit to such test or tests. For the purposes of this section, the question of whether such person lawfully refused to take a chemical test or tests, as provided for by this law, and the issues determinative shall be:

(a) Whether the arresting law enforcement officer had reasonable cause to believe that the person had been driving or had been in actual physical control of a motor vehicle in this state while under the influence of alcoholic beverages or controlled substances;

(b) Whether the person was placed under lawful arrest;

(c) Whether the person refused to submit to any such test after being requested to do so by a law enforcement officer; and

(d) Whether the person had been told that, if he refused to submit to such test, his privilege to operate a motor vehicle would be suspended for a period of 6 months, or for a period of 1 year if his driving privilege had been previously suspended for a refusal to

> submit to such test.
>
> (4) A petition for a hearing, as provided in subsection (3), filed by the affected person within 10 days of receiving notice of the action of the department shall operate to stay the suspension of the department for the period provided for the hearing. If the trial court fails to afford the hearing within such time, the suspension shall not take place until the person has been granted such hearing. If within the prescribed hearing period the person affected requests a continuance of the hearing to a date beyond the expiration of the prescribed hearing period, the suspension shall become effective on the day immediately following the prescribed period or immediately upon receipt of notice by the court that the request for continuance has been granted, whichever is the later. In every event, the court shall forthwith rule on the question herein prescribed and forward a copy of its decision to the department.
>
> (5) If the court determines upon the hearing that the suspension herein provided is according to law and should be sustained, the person's driving privilege shall forthwith be suspended by order of the court, and his license shall forthwith be delivered to the court and forwarded to the department. However, the court may, in its sound discretion, direct the department to issue a temporary driver's permit which shall be restricted to business or employment purposes and which shall not be used for pleasure, recreational, or nonessential driving.

Therefore, under Florida law the Petitioners not only had a right to refuse testing but also had a right to a hearing to determine whether they lawfully refused to submit.

Other Florida courts have noted that a statutory right to refuse testing exists in Florida. In State v. Pagach, 442 So.2d 332 (Fla.2DCA 1983) the court stated:

> In interpreting the former implied consent law, section 322.261(1)(a), Florida Statutes (1975), our supreme court held that a defendant merely had a statutory right to refuse to submit to a chemical test for intoxication and could be

> penalized for exercising that right only by a three-month suspension of his driving privileges. Sambrine v. State, 386 So.2d 546 (Fla.1980). (Emphasis supplied).
>
> Id. at 333

In State v. Gunn, 408 So.2d 647 (Fla.4DCA 1982) the Court stated:

> However, we find nothing in the Sambrine opinion which would preclude the conclusion that chemical test results are admissible where the driver does not affirmatively withdraw his consent, even though the driver is not first informed of the consequence of his refusal to submit to the test. Granted, the statute gives the driver the right to refuse testing. Likewise, it provides a definite sanction for refusal, as well as a detailed procedure for the enforcement of such sanction. Taken as a whole, 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. (Emphasis supplied).
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> Id. at 649

In summary, the Florida Legislature has enacted a statutory scheme by which a driver is deemed to have given his consent to a chemical test under certain specified circumstances. The person is given the right to refuse such testing and to request a hearing and be represented by legal counsel. Should the court find after the hearing that the person unlawfully refused to submit, a license suspension will be imposed. The person may be eligible for a temporary

permit. 322.261(4) and 322.271, Florida Statutes (1983).

In light of the fact that each Petitioner was told he or she had no right to refuse to take the test the statement of law was properly found to be misleading, improper and wrong by the County Court. The Fifth District Court of Appeal disagreed in part finding that the warning was awkward and contradictory but was not "so misleading as to render the results of the chemical test inadmissible". In a footnote the Court mentions:

> We do not decide whether the test results would be inadmissible under the statute if, after an evidentiary hearing, a court determines that a defendant was, in fact, mislead by the warning and thus improperly coerced into taking a test which he might otherwise have refused, because that issue is not before us. To avoid this result, an amendment to the warning might be deemed advisable, so that it includes only what the statute requires.
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> (A- 16 ).

The issue then is whether consent to a breathalyzer must be freely and voluntarily given or can be obtained by misadvising a Defendant of his rights. In Smith v. State, supra, this Court stated:

> Somewhat more troubling is appellant's assertion that the results of the breathalyzer examination should have been suppressed because the police improperly obtained his consent to the test. He maintains that he initially refused to take the test but relented after police advised him that he would be taken to Tallahassee Memorial Hospital and given a

> blood test if he refused to submit to the breathalyzer exam.
>
> Section 322.261(1)(a), Florida Statutes (1977), commonly known as the "implied consent law", provides that a person accepting the privilege of driving a motor vehicle in this state shall be deemed to have given his consent to submit to an approved chemical test of the alcohol content of his blood if he is lawfully arrested for any offense committed while driving a motor vehicle under the influence of alcoholic beverages. The persons's consent may be revoked, however, and section 322.261 prohibits the taking of a blood sample from a person who expressly objects to the chemical test. State v. Riggins, 348 So.2d 1209 (Fla.4th DCA 1977). The issue, then, is whether appellant's consent to the breathalyzer test was freely and voluntarily given.
>
> The ruling of a trial court on a motion to suppress is clothed with a presumption of correctness. As a reviewing court we must interpret the evidence and the reasonable inferences derived therefrom in a manner most favorable to the trial court. McNamara v. State, 357 So.2d 410 (Fla.1978). Our inquiry in this case is confined to whether there was competent evidence to support the court's ruling that appellant freely consented to the breathalyzer test. Everett v. State, 353 So.2d 648 (Fla. 3d DCA 1977); Gerrard v. State, 345 So.2d 849 (Fla.3d DCA 1977). (Emphasis supplied)
>
> Id. at 283

Based upon Smith, it appears the standard of review in this cause is whether the Petitioners' consent to the breathalyzer test was freely and voluntarily given or was improperly obtained.

The warning given to Petitioners clearly indicated they had no right to refuse to submit. Certainly under such

circumstances consent could not be considered to be free and voluntary. One court in the State of Oregon has addressed this issue directly stating:

> The results of a chemical breath test are inadmissible if the arresting officer tricks or misleads the defendant into thinnking he has no right to refuse the test. State v. Downing, 42 Or.App. 309, 600 P.2d 897 (1979); State v. Baxter, 34 Or.App. 963, 580 P.2d 203 (1978); State v. Freymuller, 26 Or.App. 411, 552 P.2d 867 (1976). The crux of the analysis in those cases is whether the words of the officer tricked or misled the defendant into taking the test. It is the objective accuracy of the officer's statements and not the defendant's subjective perceptions that control. Application of the particular exclusionary rule would be unworkable if it were made to depend on the perceptions of a person arrested for driving while under the influence of intoxicants.
>
> State v. Romero, 649 P.2d 596 (Ore.App. 1982)

An interesting comparison exists between this case and the warning given in South Dakota v. Neville, 459 U.S. 533, 103 S.Ct. 916, 74 L.Ed.2d 748 (1983). In Neville the United States Supreme Court considered the admissibility of a refusal to submit after the following card was read:

> The card read: "I have arrested you for driving or being in actual physical control of a vehicle while under the influence of alcohol or drugs, a violation of S.D.C.L. 32-23-1. I request that you submit to a chemical test of your blood to determine your blood alcohol concentration. You have the right to refuse to submit to such a test and if you do refuse no test will be given. You have the right to a chemical test by a person of your own choosing at your own expense in addition to the test I have requested. You

> have the right to know the results of any chemical test. If you refuse the test I have requested, your driver's license and any non-residence driving privilege may be revoked for one year after an opportunity to appear before a hearing officer to determine if your dirver's license or non-residence driving privilege shall be revoked. If your driver's license or non-residence driving privilege are revoked by the hearing officer, you have the right to appeal to Circuit Court. Do you understand what I told you? Do you wish to submit to the chemical test I have requested?"

The right to refuse to submit, right to an independent chemical test, and right to know the results of the test are all rights which are available to persons in Florida, however, Florida law does not require that the Defendant be informed of any of these rights. In Neville the Court also stated:

> Nor is this a case where the State has subtly coerced respondent into choosing the option it had no right to compel, rather than offering a true choice. To the contrary, the State wants respondent to choose to take the test, for the inference of intoxication arising from a positive blood alcohol test is far stronger than that arising from a refusal to take the test.
>
> We recognize, of course, that the choice to submit or refuse to take a blood-alcohol test will not be an easy or pleasant one for a suspect to make. But the criminal process often requires suspects and defendants to make difficult choices. See, e.g., Crampton v. Ohio, decided with McGautha v. California, 402 U.S. 183, 213-217 (1971). We hold, therefore, that a refusal to take a blood-alcohol test, after a police officer has lawfully requested it, is not an act coerced by the officer, and thus is not protected by the privilege against self-incrimination. (Emphasis supplied).

Id. at 74 L.Ed.2d 759

Petitioners suggest that the giving of a warning incorrectly stating that the Petitioner had no right to refuse is a clear case of the State subtly coercing the Petitioners into choosing the option it had no right to compel and that the officers request in the words utilized was not a lawful request but violated Florida Statutes.

In Miranda v. State of Arizona, 384 U.S. 436, 86 S.Ct. 1602, the United States Supreme Court noted that statements obtained from a Defendant could not truly be a product of free choice unless adequate protective devices were employed to dispel the compulsion inherent in custodial surroundings. Miranda at 86 S.Ct. 1619. In the Miranda decision the Court noted that one deceptive stratagem to which the police could resort would be the giving of false legal advice. (Miranda at 86 S.Ct. 1617). In this case the officers did, in fact, give incorrect legal advice.

If this court was incorrect in Sambrine and Smith in referring to the choice contained in the Florida Statutes as a "right" rather than an "option" to refuse as suggested by the Fifth District Court of Appeal and the Circuit Court, then the United States Supreme Court committed the same error in Neville. In Neville the United States Supreme Court stated:

> Respondent's right to refuse the blood-alcohol test, by contrast, is simply a matter of grace bestowed by the South Dakota Legislature. (Emphasis supplied).
>
> Neville, at 79 L.Ed.2d 760

In the instant cases the officers read an implied consent card which was incorrect, misleading and wrong. The Petitioners did not freely and voluntarily consent to a chemical test after being fully apprised of their rights.

## CONCLUSION

The county court correctly construed this Court's clear statements in Sambrine and ruled that a person in Florida has a statutory right to refuse testing. The trial court properly found that the Petitioners were given an improper, misleading or wrong instruction of law which was contrary to statutory provisions. The sanction of suppression of the chemical test results was an appropriate sanction under the facts of these cases. The decision of the trial court is in accordance with this Court's prior rulings. The Petitioners' respectfully request this Honorable Court issue an order quashing the decision of the Fifth District Court of Appeal granting the State's Petition of Writ of Certiorari.

Respectfully submitted,

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