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.

_____/

PETITIONERS' BRIEF ON JURISDICTION

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

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STATEMENT OF THE CASE AND FACTS

No statement of the case and of facts is necessary in this jurisdictional brief as an adequate statement of the case and of facts is contained in the opinion of the Fifth District Court of Appeal (A- 11).

SUMMARY OF ARGUMENT

The Fifth District Court of Appeal has held that persons in Florida have no right to refuse to submit to an approved chemical test of their breath to determine the alcoholic content of their blood. The decision expressly and directly conflicts with the decisions in Sambrine v. State 386 So.2d 546 (Fla. 1980), Smith v. State, 378 So.2d 281 (Fla. 1979), State v. Ducksworth, 408 So.2d 589 (Fla. 2d DCA 1981), Brown v. State, 412 So.2d 23 (Fla. 2d DCA 1982), and State v. Gunn, 408 So.2d 642 (Fla. 4th DCA 1982), all holding that a Defendant in Florida has a statutory right to refuse to submit to a chemical test for intoxication but could be penalized for exercising that right by a license suspension.

ARGUMENT

ISSUE I

WHETHER THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL REVERSING THE DECISION OF THE LOWER COURT AND HOLDING THAT PETITIONERS DID NOT HAVE A LEGAL RIGHT TO REFUSE TO SUBMIT TO A CHEMICAL TEST EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THIS COURT IN SAMBRINE V. STATE, 386 SO.2D 546 (FLA.1980) AND SMITH V. STATE, 378 SO.2D 281 (FLA.1979), AS WELL AS THE SECOND DISTRICT COURT OF APPEAL IN STATE V. DUCKSWORTH, 408 SO.2D 589 (FLA. 2D DCA 1981), BROWN V. STATE, 412 SO.2D 23 (FLA. 2D DCA 1982), AND STATE V. PAGACH, 442 SO.2D 332 (FLA 2D DCA 1983) AND THE FOURTH DISTRICT COURT OF APPEAL IN STATE V. GUNN, 408 SO. 2D 642 (FLA. 4TH DCA 1982).

In its opinion of December 26, 1985, the Fifth District Court of Appeal stated that a person in Florida does not have a legal right to refuse to submit to a chemical test and that a law enforcement officer may state to arrested persons:

> 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 a right to refuse to take the test, but if you do refuse, your driver's license will be suspended for a period of six months or one year if you have refused before. Do you understand what I have just read? (The emphasized words create the controversy here).

In reaching this conclusion the Court below expressly and directly contradicted the decisions in Sambrine v. State, 386 So.2d 546 (Fla. 1980), Smith v. State, 378 So.2d 281 (Fla. 1979), State v. Gunn, 408 So.2d 642 (Fla. 4th DCA 1982), State v. Ducksworth, 408 So.2d 589 (Fla. 2d DCA 1981), Brown

v. State, 412 So.2d 23 (Fla. 2d DCA 1982) and State v. Pagach, 442 So.2d 331 (Fla. 2d DCA 1983), all stating that a conscious person is given a right to refuse to take a chemical test if he is willing to suffer a license suspension.

The conflict in this case as noted by the Fifth District Court of Appeal commenced with the opinion of the Florida Supreme Court in Sambrine. In discussing Sambrine the Fifth District Court of Appeal stated:

> The supreme court stated the issue to be "whether or not a chemical test for blood alcohol is admissible evidence when a driver exercises the option given him by the Florida legislature in Section 322.261(1)(a), (now section 316.1932(1)(a)) Florida Statutes (1975), to refuse to consent to a chemical test of his breath." The court concluded that although there was no constitutional impediment to the taking of the blood sample over a defendant's protest, the Florida legislature, by statutory enactment, had granted to its citizens greater protection than was afforded by the federal constitution. Under this statute, stated the court,
>
> > (A) conscious person is given the right to refuse to take a chemical test if he is willing to suffer a three-month (now six months) suspension for failure to take a breathalyzer or blood alcohol test.
>
> 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. (Emphasis in the original).
>
> (A-14).

The quotation from Sambrine which the lower court utilized in its order seems clear:

> 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 sanction. (Underscoring supplied by county court). (A-3, 4).
>
> Id. at 548

At least two other District Courts of Appeal in Florida agreed with the county court that persons in Florida have a statutory right to refuse testing. In State v. Pagach 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).
>
> Pagach at 333

In State v. Gunn the Court stated:

> Granted, the statute gives the driver the right to refuse testing.
>
> Id. at 649

The conflict in interpretations of former Florida Statute 322.261(1)(a), now 316.1932(1)(a) is also clearly established by a series of opinions by the Second District Court of Appeal. In State v. Duke, 378 So.2d 96 (Fla.2DCA 1979) the court discussed a physical power/legal right dichotomy finding that a driver retained the physical power to refuse a sobriety test but not the legal right to withdraw his implied consent. This position is entirely consistent with the legal right/option dichotomy favored by the Fifth District Court of Appeal. However, the Duke decision was specifically quashed in State v. Ducksworth, 408 So.2d 589 (Fla.2DCA 1981):

> In reliance upon our opinion in State v. Duke, 378 So.2d 96 (Fla.2d DCA 1979) the county court permitted the state to introduce evidence, in appellee's DUI prosecution, that when arrested he had refused to submit to a test for alcohol in his system. The circuit court reversed appellee's conviction, on the ground that Duke was effectively invalidated by Sambrine v. State, 386 So.2d 546 (Fla.1980).
>
> The circuit court was correct. Duke was predicated upon our belief that the conditions for admissibility set forth in State v. Esperti, 220 So.2d 416 (Fla.2d DCA 1969), cert. dismissed, 225 So.2d 910 (Fla.1969), had been met, in that the tests authorized by section 322.261(1)(a), Florida Statutes, are

> compulsory. Sambrine holds that they are not.
>
> Ducksworth at 590

In Brown v. State, 412 So.2d 23 (Fla.2d DCA 1982) the court adhered to Ducksworth and again receded from Duke stating:

> This court held in State v. Duke, 378 So.2d 96 (Fla.2d DCA 1979) that one's refusal to submit to a blood test is admissible into evidence against an offending driver because such a test is compulsory. However, the supreme court in Sambrine v. State, 386 So.2d 546 (Fla.1980) has invalidated the Duke holding. Sambrine states that section 322.261, Florida Statutes (1979) gives a driver the right to refuse testing by affirmatively revoking his implied consent. Thus, when a driver exercises his statutory option to refuse testing, the result of any test taken over objection is inadmissible at trial.
>
> This court recently applied the mandate of Sambrine to facts quite similar to those in the case sub judice. In State v. Ducksworth, 408 So.2d 589 (Fla.2d DCA 1981), we wrote that inasmuch as Sambrine invalidated our holding in Duke, the state can no longer introduce into evidence the fact that the defendant refused to submit to a test for alcohol in his system. We adhere to Ducksworth, recede from Duke, and hold that the admission into evidence of appellant's refusal to submit to the blood test was improper.
>
> Brown at 23

The decision of the Fifth District Court of Appeal is also in conflict with Smith v. State, 378 So.2d 281 (Fla.1979). In Smith this Court found the trial court's had ample evidence from which to conclude that the Appellant had

been fully apprised of his rights and that his consent to the breathalyzer examination was voluntarily given. This court specifically noted in footnote 4:

> "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). (Emphasis supplied).
>
> Id. at 283

The Sambrine and Smith cases, as well as the Ducksworth, Brown, Pagach and Gunn cases are in direct conflict with the decision of the Fifth District Court of Appeal.

CONCLUSION

The Fifth District Court of Appeal has ruled that defendants in Florida do not have a legal right to refuse to take a chemical test. The Florida Supreme Court has clearly stated that persons in Florida have a statutory right to refuse testing in Smith and Sambrine. The Second District Court of Appeal in Ducksworth, Brown and Pagach and the Fourth District Court of Appeal in Gunn have all stated that persons have a right to refuse testing. The conflict between the decisions is clear.

It is respectfully requested that this Court find that the decision of the Fifth District Court of Appeal directly and expressly conflicts with earlier decisions of this Court and the Second and Fourth District Courts of Appeal and accept jurisdiction in this cause in accordance with F.R.Ap.P. #9.030(a)(2)(A)(iv).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy fo the foregoing has been furnished by U. S. Mail/~~hand~~ to John V. Doyle, Esquire, 125 East Orange Avenue, Daytona Beach, Florida 32014 and Michael H. Lambert, Esquire, 630 North Wild Olive Avenue, Sutie A, Daytona Beach, Florida 32018 this 10th day of March, 1986.

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