o/a 10-31-86

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.

_____/

REPLY BRIEF ON THE MERITS 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 CONTENTS

TABLE OF AUTHORITIES

FLORIDA CONSTITUTION

SUMMARY OF REPLY ARGUMENT

Petitioners argue that affirmatively misadvising a defendant of his right regarding chemical tests is clearly distinguishable from a defendant voluntarily giving consent without being informed that his license will be suspended upon refusal to submit.

The law enforcement officers improperly advised Petitioners that they had no right to refuse to submit to a chemical test denying the Petitioners the opportunity to make a free and voluntary decision as to whether to submit as required by Florida law.

The fact that the incorrect warning was given is sufficient evidence to sustain the trial court's ruling. An objective standard as to the propriety of the statements should be utilized.

ISSUE I

A LAW ENFORCEMENT OFFICER SHOULD NOT AFFIRMATIVELY MISADVISE A DEFENDANT OF HIS RIGHTS.

Respondent totally misconstrues the trial court's ruling and Petioners' position regarding the law. Petitioners have never maintained that Florda Statute 316.1932 creates an affirmative duty upon the arresting officer to advise the arrested person that he has a right to refuse testing. Petitioners' argument is that the officer may not affimatively advise a defendant that he does not have a right to refuse.

The State relies exclusively on Pardo v. State, 429 So.2d 1313 (Fla. 5th DCA 1983) in support of its position. Initially Pardo is easily distinguishable on its facts. In Pardo the charge was manslaughter, no implied consent warning was given, and express written consent was given by the Defendant.

The legal position espoused in Pardo was rejected by the Third District Court of Appeal in State v. Roose, 450 So.2d 861 (Fla. 3d DCA 1984). Any suggestion in Pardo that the giving of the implied consent warning is optional is inconsistent with the unambiguous language in Florida Statute 316.1932(1)(a) stating:

> 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 proceding. (Emphasis supplied).

and the clear statement of this Court in State v. Bender, 382 So.2d 697 (Fla.1980) that:

> When the prosecution presents testimony in evidence concerning motor vehicle driver intoxication which includes an approved alcohol test method by a properly licensed operator, the fact finder may presume that the test procedure is reliable, the operator is qualified, and the presumptive meaning of the test as set forth in section 322.262(2) is applicable. The test results are admissible into evidence only upon compliance with the statutory provisions and the administrative rules enacted by its authority. Gillman v. State, 373 So.2d 935 (Fla. 2d DCA 1979); State v. Wills 359 So.2d 566 (Fla. 2d DCA 1978). (Emphasis supplied).
>
> Bender, at 699

Pardo simply does not stand for the position that a law enforcement officer may affirmatively misadvise a Defendant of his rights as was done in the instant cases. Respondents' first issue is totally without merit.

ISSUE II

THE STATEMENT OF LAW GIVEN BY THE LAW ENFORCEMENT OFFICERS WAS INCORRECT, MISLEADING AND COERSIVE

Respondent again attempts to sidestep the issues raised by Petitioners in their Issue II. The warning given by Respondent, taken as a whole, is incorrect, misleading and coersive. The warning varies from the statutory language. The State's Issue II is totally without merit.

ISSUE III

A DEFENDANT SHOULD BE AFFORDED AN OPPORTUNITY TO MAKE A KNOWING AND INTELLIGENT JUDGEMENT PURSUANT TO THE IMPLIED CONSENT STATUTES

The State argues that "no law requires that a suspect freely and voluntarily consent before the State administers a chemical test". The State is entirely incorrect. In Smith v. State, 378 So.2d 281 (Fla.1979) this Court reviewed the record to determine whether the accused's consent to the breathalyzer was freely and voluntarily given.

In the recent case State v. Whitman County District Court, 714 P.2d 1183 (Wash. 1986) the Supreme Court for the State of Washington considered the effect of giving an incorrect implied consent warning on the admissibility of breathalyzer test results. Initially the Court noted that the defendant was entitled to accurate advice in order to insure he had an opportunity to make a knowing and intelligent judgement pursuant to the implied consent statutes. Id. at 1185. The court also found that the accused had a right under the implied consent statute to be afforded an opportunity to make a knowing and intelligent decision whether to submit to an evidentiary breath test. Id. at 1185. The Washington court considered two different warnings. One which indicated that a refusal "may be used against you in a subsequent criminal

trial" and another which stated that a refusal "shall be used against you in a subsequent trial". The Court approved the use of the term "may" but found that the use of the word "shall" was more coercive than required by the statute and denied the defendants the opportunity of exercising an intelligent judgement resulting in the suppression of the results of the breathalyzer.

The reasoning of the Washington court is consistent with the statements of this Court in Smith, supra. Petitioners suggest that this Court's prior opinions as well as the guarantees of due process of law in the Fifth and Fourteenth Amendments to the United States Constitution and Article I, section 9 of the Florida Constitution require that consent to a chemical test in Florida be freely and voluntarily obtained.

ISSUE IV

THE EVIDENCE IN THIS CASE IS SUFFICIENT TO SUSTAIN THE TRIAL COURT'S FINDINGS.

In the instant case the stipulated facts indicate that each Defendant was arrested for Driving Under the Influence of Alcoholic Beverages and subsequently given the incorrect warning which forms the basis of this appeal. Additional factual findings by the trial court were not necessary to support the findings of the court. The statements were incorrect, misleading and wrong on their face.

The State argues that the defendant must establish, by substantial competent evidence, that the warning given actually misled the Petitioners. Petitioners suggest that the objective correctness of the statement, rather than the subjective belief of the Petitioners should control. See, e.g., State v. Romero, 649 P.2d 596 (Ore.App.1982).

In addition the burden is upon the State to prove compliance with the statutory provisions. State v. Bender, 382 So.2d 697 (Fla.1980).

CONCLUSION

The State incorrectly argues that the manner of obtaining consent to a chemical test is irrelevant no matter how incorrect the warning. The position of the State seems to be that trickery is acceptable as the ends justify the means.

Petitioners urge this Court to find that the State may not obtain consent to a chemical test for intoxication by affirmatively misadvising persons as to their rights and reverse the decision of the Fifth District Court of Appeal.

Respectfully submitted,

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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, Suite A, Daytona Beach, Florida 32018 this 10th day of September, 1986.

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