IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs.

MICHAEL DONALDSON,

Respondent.

Case No. 76,129

NOTICE OF CORRECTION

Please note the following correction in Respondent's Answer Brief on the Merits:

> Turk v. Hall, 403 So.2d 1077 (Fla. 1st DCA 1981) cited on page 10 of the brief, correct case name is Turk v. State.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by courier to Robert S. Jaegers, Assistant State Attorney, Palm Beach County Courthouse, West Palm Beach, Florida 33401 this 17 day of December, 1990.

Cherry Grant
Counsel for Respondent

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs.

MICHAEL DONALDSON,

Respondent.

Case No. ~~76,120~~ 76,129

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Respondent, Michael Donaldson, was the defendant in the trial court, appellant in the circuit court, and petitioner in the Fourth District Court of Appeal. Petitioner, the State of Florida, was the prosecution in the trial court, appellee in the circuit court, and Respondent in the District Court of Appeal.

In the brief, the parties will be referred to as they appear before this Honorable Court.

The following symbol will be used:

R = Record on Appeal in the Circuit Court

STATEMENT OF THE CASE

Respondent accepts Petitioner's Statement of the Case with the following clarifications of the procedural posture of the case.

Respondent, Michael Donaldson, was charged by information with driving while impaired (R 57). He elected a nonjury trial (R 64). At trial Respondent objected to the admission of the breath test results (R 27-33). The objection was overruled (R 32). Motions for judgment of acquittal were denied and the court found Respondent guilty of DUI (R 40). The court sentenced Respondent as a first offender without objection or request by the state to do otherwise (R 40-41, 65).

Respondent filed his notice of appeal and that appeal was heard in the circuit court. The circuit court affirmed Respondent's conviction. Donaldson v. State, 39 Fla.Supp.2d 53 (Fla. 15th Cir. 1989).

Respondent petitioned the Fourth District Court of Appeal for a writ of certiorari which was granted. Donaldson v. State, 561 So.2d 648 (Fla. 4th DCA 1990). The District Court certified the question now before this Court.

STATEMENT OF THE FACTS

Respondent accepts Petitioner's Statement of the Facts.

SUMMARY OF ARGUMENT

Respondent was charged with driving under the influence of an alcoholic beverage to the extent his normal faculties were impaired. At trial the state introduced over objection Respondent's breath test results of 0.11 and 0.11 percent. Those test results were inadmissible because the state failed to lay the proper predicate for their admission contained in §§316.1932(1)(b)1(2) and 316.1934(3), Florida Statutes (1987) and Rules 10D-42.023 and 10D-42.024, Florida Administrative Code. While the state showed the operator qualified to conduct a test, it failed to offer any evidence that (1) the machine used was registered and checked for accuracy and reproducibility, (2) the machine was only accessible to an authorized technician, (3) test kits were stored in a clean, dry location, (4) the machine was tested monthly, and (5) required logs were inspected monthly.

This Court has previously held in State v. Bender, 382 So.2d 697 (Fla. 1980) that test results are only admissible if compliance with the statute and rules is shown. That rule correctly answers the certified question.

ARGUMENT

CERTIFIED QUESTION

IN A SECTION 316.193 PROSECUTION, WHERE THE STATE SEEKS, OVER DEFENSE OBJECTION, TO ADMIT THE RESULTS OF A BREATHALYZER TEST INTO EVIDENCE, TO WHAT EXTENT MUST THE STATE LAW A FOUNDATION TO SHOW COMPLIANCE WITH STATUTORY PROVISIONS, ADMINISTRATIVE RULES, AND AGENCY PROCEDURES GOVERNING THE LICENSING OF TECHNICIANS, THE MAINTENANCE OF EQUIPMENT, AND THE ADMINISTRATION OF TESTS?

The issue on appeal in this case was whether the trial court erred in admitting in evidence the results of a chemical breath test absent any predicate regarding the maintenance and certification of the machine used to conduct the test. As the Fourth District Court found in granting certiorari, this Court has answered that question in State v. Bender, 382 So.2d 697, 699 (Fla. 1980): "The test results are admissible into evidence only upon compliance with statutory provisions and the administrative rules enacted by its authority." Though the certified question restates the issue, the answer is the same. Because this Court has answered the question in Bender, this Court should decline to accept jurisdiction to answer it again. Zettle v. State, 427 So.2d 723 (Fla. 1983); Gangloff v. State, 427 So.2d 723 (Fla. 1983).

However, if this Court is inclined to answer the question again, it should affirm the District Court's decision. Respondent was charged in this case with a violation of Section 316.193, Florida Statutes (1987). It was alleged that he drove while under the influence of an alcoholic beverage to the extent his normal faculties were impaired or had a blood alcohol level of 0.10 percent or higher.

At trial a deputy sheriff was called as a witness. He testified that he is a certified breathalyzer operator and that he performed a chemical test of Respondent's breath (R 25-27). The test was conducted approximately 1½ to 2 hours after the initial stop (R 12). The test operator followed a checklist provided by HRS in giving the test (R 25-26). The state then attempted to introduce the results of the breath test (R 27). Counsel for Respondent objected to the admission of the results on the grounds that a predicate for their admission had not been laid and specifically that there was no testimony in the record regarding the certification or maintenance of the particular machine used to conduct the test (R 26, 29). The court below overruled the objection and allowed the operator to testify that Respondent's test results were 0.11 and 0.11 percent (R 33).

Prior to the adoption in 1977 of Chapter 322, Florida Statutes, (now renumbered and included in Chapter 316,) scientific tests for intoxication were admissible in evidence without statutory authority if the predicate for scientific evidence was established, namely, that (1) the test was reliable, (2) the test was performed by a qualified operator with the proper equipment, and (3) expert testimony was presented concerning the meaning of the test. See State v. Bender, 382 So.2d at 699 (Fla. 1980). In 1977, Florida adopted statutes requiring drivers to take approved chemical tests to determine the alcoholic content in their blood or face license suspension. Ch. 322, Florida Statutes (1977). Sections 322.261 and 322.262, Florida Statutes (1977), directed law enforcement to use only approved techniques and methods in conducting the tests and delegated to HRS and the Department of

Motor Vehicles the responsibility to develop those tests. Use of the approved methods and techniques were necessary to ensure reliable scientific evidence for court proceedings, as well as to protect the drivers who are deemed to have given implied consent to the tests. Id. By thus ensuring the scientific accuracy of the tests, (i.e. by following the approved method,) the need to lay the old scientific predicate prior to admission no longer existed. In approving the statutory scheme whereby the actual testing methods are detailed by HRS and rejecting the challenge to its constitutionality, this Court held, as stated above, "The test results are admissible into evidence only upon compliance with statutory provisions and the administrative rules enacted by its authority." Id.

Thus, before the result of a breath test can be admitted in evidence the proponent of the test must present evidence to either satisfy the requirements of the statute and administrative rules, or lay the predicate required for other scientific evidence.

That portion of Chapter 322, Florida Statutes (1977) dealing with chemical breath tests (§§322.261 and 322.262) are now included in §§316.1932 and 316.1934, Florida Statutes (1987).

Section 316.1932(1)(f)1 provides:

> The tests determining the weight of alcohol in the defendant's blood shall be administered at the direction of the arresting officer substantially in accordance with rules and regulations which shall have been adopted by the Department of Health and Rehabilitative Services. Such rules and regulations shall be adopted after public hearing, shall specify precisely the test or tests which are approved by the Department of Health and Rehabilitative Services for reliability of result and facility of administration, and shall provide an approved method of administration which

shall be followed in all such tests given under this section.

Section 316.1934(3), Florida Statutes (1987) contains a similar provision.

Pursuant to the above statutory authority HRS has adopted rules governing breath testing. The rules are contained in the Florida Administrative Code. Rule 10D-42.023 provides:

> Registration --- Chemical Test Instruments or Devices. All chemical breath test instruments or devices used for breath testing under provisions of Chapters 316 and 327, Florida Statutes, shall be previously checked, approved for proper calibration and performance, and registered by authorized personnel of the Department, by trade name, model number, serial number and location, on forms provided by the Department. All such chemical test instruments or devices registered hereunder shall be checked at least once each calendar year (January 1 through December 31) for accuracy and reproducibility.

(emphasis added).

Rule 10D-42.024 provides:

> Approved Chemical Breath Testing Instruments and Devices -- Operational and Preventive Maintenance Procedures.
> (1) General Rules
> (a) Chemical test instruments used in the breath method must be kept in a suitable location which should only be accessible to an authorized technician and such other personnel as may be designated by the technician.
> (b) Test kits must be stored in a clean, dry location.
> (c) Chemical test instruments and devices used in the breath method shall be inspected at least once each calendar month by a technician to insure general cleanliness, appearance and accuracy.
> (d) Required logs will be inspected monthly by a technician to insure that proper records are being made.
> (e) The Department of any agency or individual it may appoint shall check to ascertain that the aforementioned rules and procedures are being adhered to by the

> individual agencies conducting chemical analyses of breath under Chapters 316 and 327, Florida Statutes.
> (f) The technician, arresting officer, or person administering the collection of the breath sample must make certain the subject has not taken anything by mouth or has not regurgitated for at least twenty minutes before administering the test. This provision shall not be construed to require an additional twenty minute observation period before the administering of the second test.
> (g) Failure to comply with any of the provisions of this Rule may result in the loss of registration of the instrument or loss of the permit of the technician or both. The above rules and procedures shall not be construed so as to prevent any other agency from using its chemical test instrument in any approved training program, provided that at the conclusion of the training program the instrument is given a preventive maintenance check by a technician and found to be in operable condition. Said check to be performed according to rules as stated herein.

(emphasis added). Operational checklists for each approved machine then follow.

In the instant case the state, as proponent of the test, introduced evidence that the person operating the machine was a certified operator (R 25). No evidence was tendered to satisfy the requirement that the particular machine used was registered pursuant to Rule 10D-42.023, Florida Administrative Code. Further, no evidence was offered that (1) the machine was accessible only to an authorized technician, (2) kits were stored in a clean, dry location, (3) the instruments were inspected at least once each calendar month, and that (4) required logs were kept and inspected monthly as required by Rule 10D-42.024, Florida Administrative Code.

In State v. Wills, 359 So.2d 566 (Fla. 2d DCA 1978) a trial court excluded from evidence the results of a breath test based

upon its finding that access to the equipment was not limited to authorized technicians as required by administrative rule 10D-42.024(1)(a). The district court upheld the exclusion and found that where statutes condition the validity of test results on compliance with approved methods and techniques, violation of those methods render the results inadmissible. Id. Other jurisdictions have reached the same results. Id. at 568 and cases cited therein. E.g. State v. Miracle, 294 N.E.2d 903, 905 (Oh. 1973) ("Before the results of a Breathalyzer test given an accused are admissible in evidence against him, it is incumbent on the state to show that the instrument was in proper working order and that its manipulator had the qualification to conduct the test"); State v. Gallant, 227 A.2d 597, 599 (N.H. 1967) (blood test performed in proper place but no evidence done in accordance with methods prescribed...." substantial compliance with the (implied consent) statute is a basic prerequisite to its effective operation").

In Turk v. Hall, 403 So.2d 1077 (Fla. 1st DCA 1981) the state was allowed to introduce documents appearing to be certificates registering the intoximeter used in the test. The document was a photocopy bearing an original seal but no original signature. The document was admitted as a copy of a public record. The district court found that the document was inadmissible (for reasons not germane to this appeal) and stated:

> Had the documents at issue been excluded at trial, the blood alcohol test results would not have been admissible since they are admissible only upon compliance with the statutory provisions and the administrative rules.

Id. at 1079.

In Wills and Turk convictions were reversed because without the evidence admitted in error there was no showing of compliance with the required administrative rules. In the case at bar no attempt was even made to introduce evidence of compliance with the requirements of Rules 10D-42.023 and 10D-42.024 as detailed below. Without this required predicate there is no way to determine that the test results are scientifically reliable. The state attempted to justify the lack of predicate by citing Ridgeway v. State, 514 So.2d 418 (Fla. 1st DCA 1987). However, unlike the instant case, in Ridgeway evidence was tendered regarding the inspection and maintenance of the test machine. The issue in Ridgeway was whether the testimony showed substantial compliance with the rules. (In that case the machine was inspected in April, the defendant was tested five days later, but the machine was not reinspected in May.) Here, no predicate was attempted so there could be no showing of substantial compliance. Likewise no attempt was made to lay a predicate that the results were admissible as reliable scientific evidence.

In the instant case the state failed to present the following evidence concerning the test machine:

> (1) Was registered by authorized personnel of HRS by trade name, model number, serial number and location, after proper calibration. Rule 10D-42.23, Fla.Admin.Code.
>
> (2) Was checked once a calendar month for accuracy and reproducibility. Rule 10D-42.23, Fla.Admin.Code.
>
> (3) The location, accessibility and storage. Rule 10D-42.24, Fla.Admin.Code.; State v. Wills.
>
> (4) Was inspected monthly. Rule 10D-42.24, Fla.Admin.Code.

(5) Logs reflecting proper entries of all tests and logs inspected monthly. Rule 10D-42.24, Fla.Admin.Code.

Failure to even minimally address these predicate requirements rendered the test results inadmissible until a proper predicate was laid. The results of the tests were therefore inadmissible in Respondent's trial and should have been excluded when counsel for Respondent objected to their admission.

The state has argued throughout this appeal that simply having a certified breathalyzer operator introduce the HRS operational checklist is a sufficient predicate for the admission of breath test results. The state now seems to recede from that position and instead claim that the deputy's testimony encompassed all the rules set forth in Title 10 of the Florida Administrative Code. Petitioner's Brief at 11. To support that position the state cites a single question and answer as follows:

Q. In preparing to take the breath sample, did you follow the HRS standards?

A. Yes I did.

Of course what the state wholly ignores is the next question:

Q. What are those standards?

A. I followed the checklist that is given to us by the State of Florida HRS Division.

(R 25). The state then produced the operational checklist (R 26). To now claim that the answer given was any more than a statement that the deputy followed the checklist is disingenuous at best.

The Florida Statutes and Administrative Rules as outlined above require basically two things as a predicate for admitting breath test results: (1) a certified operator and (2) a properly

working and certified machine. The state's argument that proof of the first eliminates the need for any evidence of the latter makes no logical sense. What that argument refuses to acknowledge is that a machine which has not been shown to have ever been certified, calibrated, or maintained cannot be relied upon to give a correct reading even if it is properly switched on and all the operating instructions are faithfully followed. As Judge Downey pointed out in his concurring opinion here "(i)t is difficult to think of a reason why the legislature would consider the competence of the operator to be more important than the accuracy of the equipment" citing State v. Fogle, 254 Or. 268, 459 P.2d 873, 876 (1969). Donaldson v. State, 561 So.2d 648, 652 (Fla. 4th DCA 1990). For these reasons this Court should not recede from or modify State v. Bender.

CONCLUSION

Based on the foregoing arguments and the authorities cited therein, Respondent respectfully requests this Court to affirm the decision of the Fourth District Court of Appeal.

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CERTIFICATE OF SERVICE

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Counsel for Respondent