IN THE SUPREME COURT OF THE STATE OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

MICHAEL DONALDSON,

Respondent.
_____/

CASE NO. 76,129

PETITIONERS'S BRIEF ON THE MERITS

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AUTHORITIES CITED

PRELIMINARY STATEMENT

PETITIONER, the STATE OF FLORIDA, was the prosecuting authority, and RESPONDENT, MICHAEL DONALDSON, was the defendant in the Criminal Division of Palm Beach County Court, the Honorable Howard H. Harrison, Jr., County Judge, presiding. Respondent took an appeal to the Circuit Court of the Fifteenth Judicial circuit, in and for Palm Beach County, Florida, the Honorable James T. Carlisle, Circuit Judge, acting in its appellate capacity. Respondent then petitioned for a writ of certiorari to the District Court of Appeal of the State of Florida, Fourth District, the Honorable Judges Garrett, Downey and Polen, presiding. Petitioner has now invoked the discretionary jurisdiction of this Court.

In the brief, the parties will be referred to as they appear before this Honorable Court, by name, or as the State and the Defendant.

All emphasis is supplied by petitioner unless otherwise indicated.

The symbol "R" represents the Record on Appeal from the trial court.

The symbol "APP" refers to the appendix to Respondent Donaldson's Petition for Writ of Certiorari to the District Court.

STATEMENT OF THE CASE

This cause comes before this Court in its discretionary jurisdiction to review the decision of the District Court which was certified to have passed upon a question of great public importance, to wit:

> In a section 316.193 prosecution, where the State seeks, over a defense objection, to admit the results of a breathalyzer test into evidence, to what extent must the State lay 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?

Donaldson v. State, 561 So.2d 648, 651 (Fla. 4th DCA 1990).

The District Court held, in a split decision, Polen, J., dissenting, that the Circuit Court departed from the essential requirements of law when it upheld the trial court's admission of breathalyzer test results following the trial court's finding that the instrument's maintenance procedures had been performed substantially in compliance with HRS regulations. The Circuit Court Opinion states:

> Appellant was charged with driving under the influence (DUI). Deputy Golson was called by the State and testified that he had a valid permit to operate a breathalyzer at the time he administered the test; that he followed the check list furnished by the Department of Health and Rehabilitative Services; that he observed the defendant for twenty minutes prior to administering the test and determined defendant did not put anything into his mouth nor regurgitate. He also testified as to the type of machine used, but the answer was inaudible. (T.36 [Correctly (R 26)]. See also (App. 25), checklist and results cards showing instrument was a "S & W 900A, Serial No. 93100. This model is one contained on the HRS Form 1031, October 84.]) Because the issue was not raised on appeal, I assume the answer was that the machine was one approved by HRS.

> Appellant objected on the ground the State did not produce the maintenance records. [(R 26)] The trial court admitted the test results because the testing showed substantial compliance pursuant to s.316.1934(c)(3) [correctly s.316.1934 (3)] F.S.

Donaldson v. State, 39 Fla.Supp.2d 53, at 54 (Fla. 15th Cir. 1989).

The trial court's decision to admit evidence of the breathalyzer test results was based upon his stated ruling:

> The Court is going to rule that the only requirement, that he has the certification, and he's testified that he followed the checklist, and that he is, in fact, was using a machine which is approved by the State of Florida, Department of Rehabilitative Services, but that is all that is required, assuming there was probable cause for the arrest.

(R 32).

The Circuit Court affirmed the trial court, stating, at 39 Fla. Supp.2d 54:

> The real issue presented by this case is how many hoops does the State have to jump through in order to lay a sufficient predicate to admit the breathalyzer. The State contends there are only three hoops, i.e.: a licensed operator, compliance with the check list, and an approved instrument.

The Circuit Court listed the requirements of s. 10D-42.04(1), Florida Administrative Code (FAC), and then, after noting rather ludicrous examples of courthouse "lore", observed that Fla. Stat. s. 316.1934(3) provides that breath analysis for alcohol content need only be performed "substantially in accordance with the methods approved by the Department of Health and Rehabilitative Services" [and by an individual possessing a valid permit issued by the department for this purpose.] "Any insubstantial differences between approved techniques and actual testing

procedures in any individual case shall not render the test or test results invalid."

The Circuit Court noted that in Ridgeway v. State, 514 So.2d 418 (Fla. 1st DCA 1987), there was no inspection 39 days prior to Ridgeway's test, which was not in compliance with the HRS Rule, but there was an "absence of evidence that the delay was of crucial significance." The District Court, in granting the petition for writ of certiorari, held that in this case the State omitted "half of the approved testing process by not introducing evidence to establish that the "General Rules" contained at 10D-42.024 FAC, were complied with. These rules require that instruments be "kept in a suitable location ... accessible to an authorized technician ... . Test kits be stored in a clean, dry location. ... be inspected at least once each calendar month ... to ensure general cleanliness, appearance and accuracy. ... Required logs will be inspected monthly."

Judge Polen, in his dissent, observed that this Court, in State v. Bender, 382 So.2d 697 (Fla. 1980), held:

> 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.

These presumptions are noted, in the opinion, as being "rebuttable", but no rebuttal was offered.

This Court has had the question certified as to the extent of the predicate required. The District Court determined the Circuit Court's affirmance of the trial court's admission of the evidence was a departure from the essential requirements of the law.

STATEMENT OF THE FACTS

Respondent, MICHAEL DONALDSON, was charged with driving under the influence (DUI), by information dated November 9, 1987. (R 57)

Respondent was represented by attorney Craig Wilson, who obtained discovery from the State, which discovery materials included the breathalyzer operator's permit, maintenance records, logs, machine certificate, chemical test record, operator's checklist and the results card. (R 62) Respondent waived a jury trial. (R 64)

At trial before the judge alone, the arresting officer, Officer Robert Smith, testified respondent was stopped for unlawful speed, (R 8), and Officer Smith detected the odor of alcohol and noticed respondent's eyes were bloodshot and watery. (R 9) After observing respondent's failed performance of roadside sobriety tests, Officer Smith arrested respondent for DUI. (R 10-12) Officer Cohan testified he arrived as a "backup" and also observed respondent fail the roadside tests. (R 18-20)

Following the arrest, Officer Smith drove respondent to the "BATmobile" mobile testing facility. (R 12) The breath testing was conducted approximately two hours after respondent's arrival at the testing facility. (R 12) In Smith's opinion, based upon his participation at least 500 DUI arrests, respondent was under the influence of alcohol.

Deputy Golson, of the Palm Beach County Sheriff's Office, who had earlier been told to remain outside by the trial judge (R 4), testified that he was a certified breathalyzer operator

and that he had administered the breath tests to respondent. (R 24) His certificate was produced but trial defense counsel stipulated to the fact of his certification. (R 25)

Deputy Golson testified he observed respondent for 20 minutes, and did not see respondent eat, drink, smoke or vomit during that period of time. (R 25)

Deputy Golson testified that in preparing to take respondent's breath sample he followed HRS standards. (R 25)

Deputy Golson testified he followed the checklist from HRS (R 25), filled it out, tested respondent an "(inaudible)" machine, and that the checklist was used in the ordinary course of business. [The checklist is reproduced at (App. 25).]

Trial defense counsel objected on the basis that there was not yet a "proper predicate laid in terms of the maintenance of this machine or the certification and the use of the machine. (R 26) This objection was sustained. (R 26)

Deputy Golson proceeded in his testimony to state that respondent exhaled into the instrument, giving two samples five minutes apart. (R 27) Golson had a copy of the results which the State then offered into evidence. (R 27, copy of results card at R 58.) The defense again objected, for the same reason. (R 27)

In argument, the State, at R 27, referred to Gent v. State, now commonly referred to as Ridgeway v. State, 12 FLW 2476 (Fla. 1st DCA, October 28, 1987), 514 So.2d 418 (Fla. 1st DCA 1987). The defense, in response, represented trial defense counsel had deposed Officer Carman (Deputy Ira Karmelan) who "brought in all

the records, etcetera, and I think he is the actual, legitimate person who is a custodian of the records, and I think the predicate must be laid through him with the proper documentation, showing that the machine was properly maintained under HRS regs, and was in fact, certified to be used." (R 28-29)

The trial judge overruled the objection. (R 32)

The results, .11 - .11, were testified to by Deputy Golson. (R 33) A videotape of respondent's action at the "BATmobile" was published to the court and the State rested. (R 34)

The defense moved for a judgment of acquittal (R 35) and rested. (R 36)

Respondent was found guilty (R 40), and despite a prior DUI in New York, (R 40), was sentenced as a first offender to pay a $250.00 fine, court costs, endure a six months suspension of driving privileges, serve one year of probation, and perform 50 hours of community service. (R 41)

SUMMARY OF THE ARGUMENT

The certified operator testified he followed the approved HRS checklist. The statute, Fla. Stat. s. 316.1934(3) requires nothing more. The defense may rebut, if possible, but to require the State to lay a foundation sufficient to cover each and every matter contained in Title 10, Florida Administrative Code, is to send the State and trial courts off on "a fool's errand."

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 LAY 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?

When the State makes a prima facie case as to showing statutory and regulatory compliance, a sufficient foundation has been laid and the burden must then shift to the defendant to show noncompliance. See, State v. Bender, 382 So.2d 697 (Fla. 1980).

At trial, the defense stipulated that the breathalyzer technician, Deputy Golson, was certified in accordance with Florida Statutes and Rules. (R 25) Golson was then asked,

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

Petitioner submits nothing more was necessary according to Florida law to establish a prima facie foundation for the admission of the breathalyzer test results. Fla. Stat. s. 316.1934(3) states:

> A chemical analysis of a person's blood to determine alcoholic content or a chemical or physical test of a person's breath, in order to be considered valid under the provisions of this section, must have been performed substantially in accordance with methods approved by the Department of Health and Rehabilitative Services and by an individual possessing a valid permit issued by the Department

for this purpose.

At trial, the evidence was that Deputy Golson did follow the HRS standards. There was no evidence that he ever deviated, even insubstantially, from methods approved by HRS. Also, Golson was stipulated to be an individual possessing a valid HRS permit. Nothing more is required by the law.

The statute continues:

> Any insubstantial differences between approved techniques and actual testing procedures in any individual case shall not render the test or test results invalid. The Department of Health and Rehabilitative Services may approve satisfactory techniques or methods, ascertain the qualifications and competence of individuals to conduct such analyses and issue permits which shall be subject to terminations or revocation in accordance with rules adopted by the department.

However, as pointed out above, there was no evidence introduced at trial of any differences between approved techniques and actual testing procedures in Mr. Donaldson's case.

The District Court stated, in its opinion granting the petition for writ of certiorari, that "the Circuit Court departed from the essential requirements of law when it found substantial compliance with HRS maintenance procedures. Neither the general rules nor Form 711 was mentioned during the bench trial."

Petitioner, however, submits that Golson's all encompassing testimony, that he did follow the HRS standards, included Rule 10D-42.024, its "General Rules", Form 711, and, literally, any other HRS standard set forth at Title 10 of the Florida Administrative Code which contains all the HRS regulations.

In support of this position, petitioner directs the Court's attention to the following out-of-state cases reviewing the admissibility of breathalyzer test results under similar circumstances. In State v. Kimmell, 720 S.W.2d 790 (Missouri Appellate, W. Dist., 1986), the court held that evidence that the officer operating the breathalyzer was certified to do so, and that the test was administered in accordance with the operating procedure of the Department of Health, laid a sufficient foundation for the admission of the test results. Kimmell followed the Missouri Supreme Court's en banc decision in Collins v. Director of Revenue, 691 S.W.2d 246 (Mo. en banc 1985), which also held, at 253:

> A contention that the breathalyzer machine was not in proper operating condition can only be validly made if supported by some evidence which at least suggests that a malfunction occurred despite adherence by the testing officer to the correct test methods.

As in Mr. Donaldson's case, no suggestion of a malfunction was made in the Collins cases. As in Mr. Donaldson's case, in the Collins cases, the testing officers simply testified they followed a Health Department checklist and introduced the checklists. Id., at 253.

Petitioner also submits State v. Taber, 474 A.2d 877 (Maine 1984), is instructive. It holds that exclusion is not required simply because there was no evidence of the list of steps taken to ensure conformance with regulations. Under Maine law, which petitioner submits is similar to Florida's "substantial compliance" requirement in s. 316.1934(3), the failure to conform

to the Maine regulation is not, by itself, a basis to exclude test results unless the evidence is determined to be not sufficiently reliable. Taber did not demonstrate any unreliability on her appellate record, so the reviewing court determined she had not met her burden of proof.

Petitioner notes that in Hawaii, a line of cases following State v. Rolison, 733 P.2d 326 (Hawaii 1987), requires "strict compliance" with all administrative rules dealing with testing instruments for accuracy. This is decisional law promulgated in a state which never enacted rules such as those present in Title 10 of the Florida Administrative Code, or the Missouri Code, or the Missouri and Maine health department regulations. On this basis the Rolison decision, which required more than the mere introduction of the operator's checklist and testimony he completed each step methodically in order to establish the foundation for admission, must be distinguished.

Finally, petitioner points to Florida precedent. As Judge Polen points out, in his dissenting opinion in the District Court, this Court, in State v. Bender, 382 So.2d 697 (Fla. 1980), has essentially stated what the petitioner now urges this Court to follow in reversing the District Court's opinion, to wit:

> The test results are admissible into evidence only upon compliance with the statutory provisions and the administrative rules enacted by its authority.

Id., at 699. At trial, the State introduced testimony that Deputy Golson, a properly licensed operator, followed HRS standards, used an approved HRS checklist, followed the checklist

and tested the defendant on a Smith & Wesson 900 A, an instrument listed on the HRS checklist form. (R 26, App 25.) The tests were run five minutes apart as required by the checklist. (R 26, App 25) This Court, in Bender, required nothing more. This Court further stated, in Bender, that the defendant could attack the test procedure reliability. Mr. Donaldson, however, despite having all the necessary materials available to him via discovery (R 62) never attempted to challenge the reliability of the procedure based upon the operator's permit, which was stipulated into evidence, the maintenance records, logs, machine certificate, chemical test record, operator's checklist or the results card. Trial defense counsel was no fool. Yet, as the Circuit Court judge stated, every attempt was made to send the State, and the trial court, on a fool's errand.

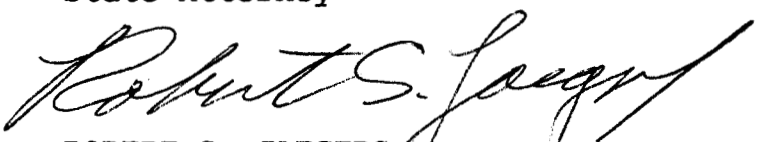
The District Court's opinion fails to recognize that Deputy Golson's testimony and the stipulation of his qualifications was sufficient to establish the prima facie foundation for admissibility of the test results pursuant to Fla. Stat. s. 316.1934(3).

CONCLUSION

The petition for writ of certiorari should be granted. The opinion of the District Court should be reversed as to the issue giving rise to the certified question. The certified question should be answered by stating, "The test results are admissible into evidence upon compliance with the statutory provisions and the administrative rules enacted by its authority. A prima facie case is made upon showing a certified operator followed an operational checklist provided by HRS." This case should be remanded for execution of sentence.

Respectfully submitted,

DAVID H. BLUDWORTH
State Attorney



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by courier to CHERRY GRANT, ESQUIRE, Assistant Public Defender, Public Defender's Office, 301 North Olive Avenue, West Palm Beach, FL 33401, this 15th day of August, 1990.

Robert S. Faegy

Of Counsel