

IN THE SUPREME COURT OF THE STATE OF FLORIDA

FILED

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CLERK, SUPREME COURT

By

Deputy Clerk

STATE OF FLORIDA,

Petitioner,

CASE NO. 76,129

v.

MICHAEL DONALDSON,

Respondent.

PETITIONERS'S REPLY BRIEF ON THE MERITS

DAVID H. BLUDWORTH
State Attorney

ROBERT S. JAEGER
Assistant State Attorney
Florida Bar No. 248193
300 North Dixie Highway
Room 105
West Palm Beach, Florida 33401
(407) 355-2233

Counsel for Petitioner

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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?

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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 AND FACTS

Petitioner relies upon the statements in its initial brief on the merits.

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."

REBUTTAL 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?

At trial the breathalyzer operator testified he followed Florida Department of Health and Rehabilitative Services (HRS) standards. (R 25) As respondent shows in his brief, those HRS standards contemplate Code (FAC) Rules 10 D-42.023, and 10 D-42.024. Respondent argues that merely stating that he followed HRS standards and the HRS checklist is an insufficient "predicate" to establish "substantial compliance" with the aforementioned Rules 10 D-42.023 and 10 D-42.024. Petitioner submits that the breathalyzer operator (technician) could not truthfully state he complied with HRS "standards" unless he had, in fact, complied with said standards, meaning he complied with Rules 10 D-42.023 and 10 D-42.024, because these are the only "HRS standards" involved when one contemplates obtaining a breath sample. The "checklist" HRS requires to be used with each type of breath testing instrument simply assists a technician to follow the required steps, but the "checklist" itself is a part of Rule 10 D-42.024. For example, for a Smith and Wesson Electronics Company Manual Model 900 and 900A, operational and maintenance procedures are contained at FAC Rule 10 D-42.024(2)(a) and (b).

Petitioner is simply saying that a sufficient predicate is established by an affirmative answer to the question, "Did you follow HRS standards?" These standards, as noted above, are written down in the FAC Rules Chapter 10 D-42, and are, of course, available to trial defense counsel. Petitioner submits the predicate for admission of breath alcohol test results should be no more complicated than the predicate of asking a medical care provider if they took a patient's temperature in accordance with accepted medical practice standards. Naturally opposing counsel may inquire of matters regarding the competency of the person doing the testing and the condition of the equipment, but one never hears a proponent of a doctor asking the doctor whether he kept his thermometer in an icebox, or the number of times the thermometer has been inspected over the past annual period! Obviously the opponent may ask if the thermometer was cracked, or was it under the patient's tongue for a long enough period of time, but in the absence of such questions, as in the absence of any questions by trial defense counsel in Mr. Donaldson's case, there is no reason to exclude the evidence.

As Judge Carlisle's Circuit Court Opinion stated, "to require proof that the maintenance had been faithfully performed and that the device and its power supply, as well as other instruments themselves used to test the machine were in perfect order, is to send the State and Court on a fool's errand." The technician (breathalyzer operator) testified he followed the HRS standards. He followed the checklist. The checklist, at FAC Rule 10 D-42.024(2) covers every health testing instrument in the

Florida inventory, including the ones used by Deputy Golson, as far as their operational and maintenance standards.

Granted, petitioner's argument asks for an interpretation of the words standards and checklist to be taken to an extreme, but these are logical extremes. Petitioner submits that the defense had a fair opportunity to cross examine, but chose instead to send the State on a "fool's errand" to swat at every error that might ever fly up in the course of the history of breathalyzer testing, even though the defense had received full discovery of every maintenance check and procedure on the instrument in question.

In response to respondent's quotation of Judge Downey's apparent lament regarding the absence of concern for accuracy of the equipment when concern is shown for the competency of an operator, petitioner simply says the instruments don't know when they aren't working properly, but a certified operator does, and only the operator can tell if his instrument does not meet HRS standards. Here, the testimony was that HRS standards and the checklist were followed.

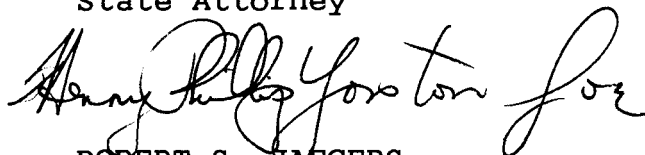
The evidence established a sufficient predicate to admit the breathalyzer test results.

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

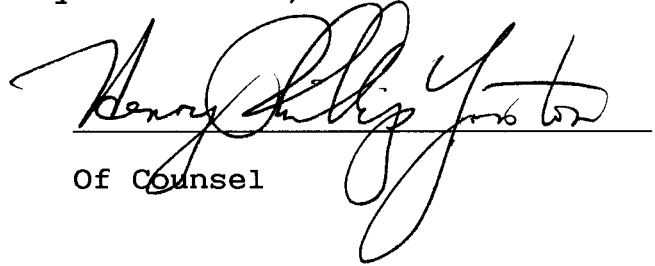
A handwritten signature in cursive script, appearing to read "Robert S. Jaegers for".

ROBERT S. JAEGER
Assistant State Attorney
Florida Bar No. 248193
300 North Dixie Highway
Room 105
West Palm Beach, Florida 33401
(407) 355-2233

Counsel for Petitioner

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 19th day of October, 1990.


Of Counsel