WOOA

IN THE SUPREME COURT OF THE STATE OF FLORIDA

FILED
SID J. WHITE
DEC 6 1990
CLERK, SUPREME COURT
By Deputy Clerk

BILLY WOODS, et al.,

Petitioner,

v. Case No. 76,163

STATE OF FLORIDA,

Respondents.

_______________________________/

RESPONDENTS BRIEF ON THE MERITS

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

BELLE B. TURNER
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 397024
210 N. Palmetto Avenue
Suite 447
Daytona Beach, FL 32114
(904) 238-4990

COUNSEL FOR RESPONDENT

STATEMENT OF THE CASE AND FACTS

Respondent generally accepts the petitioner's recitation of the case with the following additions:

Petitioners filed a motion in the county court of Volusia County to preclude introduction of the results of a chemical test of their breath in their prosecutions for driving under the influence of alcohol. On December 19, 1988, County Court Judge Briese entered an order granting the motion in limine on the basis that the failure of the current HRS regulations to require detained agency record keeping of machine modifications, malfunctions, and repairs does not assure scientific reliability of the evidence. The county court found that the alleged deficiency frustrated the defense's ability to receive a fair trial by foreclosing an opportunity for the defense to effectively challenge a machine's reliability by cross-examination and use of defense expert witnesses. The county court certified to the district court a question of great public importance, to wit: "In order to assure reliable scientific chemical test evidence must HRS implement regulations requiring detailed agency record keeping of machine modifications, malfunctions, and repairs?"

The state timely filed notice of appeal in the district court on December 30, 1988. By order dated January 11, 1989, the court accepted jurisdiction. Fla.R.App.P. 9.160

All briefs were filed and oral argument was requested. The state moved to expedite the appeal. On July 28, 1989, the

district entered an order declining to accept jurisdiction after further consideration. The appeal was transferred to the Circuit Court for Volusia County, Florida for consideration of the issues therein and the motion to expedite.

On October 3, 1989, oral argument was held in the Circuit Court. On November 9, 1989, the circuit court filed its corrected decision in this case. This decision first noted that there were several undisputed facts below, including: that the legislature had properly delegated to HRS the exclusive responsibility of adopting rules for the reliable analysis of a person's breath, and that upon a showing of substantial compliance with those rules, the breath test is admissible and the accuracy of such results is presumed; that this presumption is rebuttable by the defendant upon a showing of substantial noncompliance with the rules enacted by HRS; that the Intoxilyzer Model 5000 is an approved chemical breath testing instrument; that the specific machine which conducted these tests was approved and recertified in compliance with HRS regulations; that the current rules are lawfully adopted; and that the current rules do not require agencies to keep records of machine modifications, malfunctions or repairs.

The circuit court decision initially found that the defendants did not produce evidence of any noncompliance, substantial or otherwise, by the local agency with regard to any current HRS regulation, nor did they produce any evidence of the inaccuracy of their breath test results. The court correctly

noted that the lack of this evidence in and of itself was a sufficient basis to reverse the county court for even considering the constitutional issues. However, the circuit court found compelling reasons to review the correctness of the rulings on constitutionality despite the complete lack of demonstrated relevance to the cases at bar.

The circuit court held that the county court "has usurped the jurisdiction of HRS in derogation of the doctrine of the separation of powers" by giving mandatory directions to a state agency concerning the performance of its administrative functions. As to the due process claim, the court held that the current rules and statutes are reasonably calculated to assure scientific reliability of breath test results and the defendants had several avenues to question the reliability of such tests under these existing provisions. Further, even if the additional records of malfunctions, repairs and modifications were required, such records would be only potentially beneficial to a defendant pursuant to California v. Trombetta, 467 U.S. 479 (1984), the state would have no duty to maintain or not destroy the records, especially in light of the numerous alternative means of challenging the reliability of the testing machine. Finally, the circuit court correctly held that the constitutional right of confrontation under the sixth amendment does not encompass physical evidence, citing G.E.G. v. State, 389 So2d 325 (Fla. 5th DCA 1980).

On November 29, 1989, petitioners served a motion for rehearing of the November 9, 1990 opinion. Rehearing was denied by order dated December 12, 1989.

Respondents then filed a petition for writ of certiorari in the District court of Appeal, Fifth District, on January 16, 1990. Four days later, the court issued an order to show cause why the petition should not be granted. The state filed response on February 8, 1990, advancing both procedural and merits arguments.

On May 17, 1990, the district court entered its order declining to issue the writ "... for the reasons stated in Williams v. State, 540 So.2d 229 (Fla. 5th DCA 1989)..."

On June 13, 1990, petitioners filed a Notice to Invoke the Discretionary Jurisdiction of this court. Jurisdictional briefs were timely filed. By order dated, October 24, 1990, this court accepted jurisdiction and disputed with oral argument.

SUMMARY OF ARGUMENT

Respondents acknowledge the recent case of Fieselman v. State, 566 So.2d 768 (Fla. 1990).

However, as the correct result was reached below, respondents respectfully request this court to affirm the decision below.

ARGUMENT

RESPONDENT AGREES THAT SUBSEQUENT CASELAW UNDERMINES THE DECISION BELOW, BUT SUGGESTS NEVERTHELESS THAT THE CORRECT RESULT WAS REACHED.

Respondents recognize that after the decision issued by the district court, this court's decision was issued in Fieselman v. State, 566 So.2d 768 (Fla. 1990). The state acknowledges that this decision invaldates the district court decision.

Nevertheless, respondent respectfully suggests that petitioner cannot prevail on the merits. The state argued the merits as an alternative to declining to issue the writ. The county court exceeded his authority by ordering an executive branch agency to promulgate rules, which violates the constitutional separation of powers. The county court erroneously determined that the constitutional right of confrontation extends to physical evidence like records. The county court order was a departure from the essential requirements of law as it exceeded its authority and misapplied the law.

Certiorari is an extremely limited remedy which is not to be used as a substitute for an appeal. State v. Pettis, 520 So.2d at 254, (J. Overton, concurring) Courts should exercise their discretion to review a case by common law certiorari only when there has been a violation of a clearly established principle of law resulting in a miscarriage of justice. Combs v, State, 429 So.2d 850 (Fla. 1983) In this case, petitioners sought to create

a principle of law, namely, that the present rules were inadequate because they did not require records of malfunctions and modification. The county court agreed, and in effect, ordered HRS to promulgate rules for such record keeping. Therefore, by definition, there cannot have been a departure from a clearly established principle of law which announced for the first time in this case.

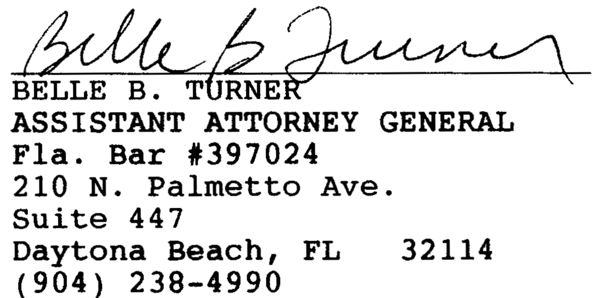
Respondent respectfully suggests that the district court reached the correct result, albeit for a reason that was subsequently invalidated. This argument consitutes an alternate ground to affirm the disposition of this case.

CONCLUSION

Based on the arguments and authority presented herein, respondents respectfully request this court approve of the result reached by the District Court of Appeal, Fifth District.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



BELLE B. TURNER
ASSISTANT ATTORNEY GENERAL
Fla. Bar #397024
210 N. Palmetto Ave.
Suite 447
Daytona Beach, FL 32114
(904) 238-4990

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to Flem Whited, III, 630 N. Wild Olive Avenue, Suite A, Daytona Beach, FL 32118, by mail delivery on this 4th day of December, 1990.

BELLE B. TURNER
ASSISTANT ATTORNEY GENERAL