IN THE SUPREME COURT OF THE STATE OF FLORIDA

WILLARD CARL ROBERTSON,

Petitioner,

v. CASE NO. 77,021

STATE OF FLORIDA,

Respondent.

_____/

RESPONDENT'S BRIEF ON THE MERITS

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SUMMARY OF ARGUMENT

The person who performed the analysis of Robertson's blood was supervised by a certified analyst and therefore the state established substantial compliance with section 316.1933, Florida Statutes, (1987). The HRS rule governing application for a permit to test blood requires practical experience and current employment in a laboratory. The first certified question should be answered in the affirmative as this testing procedure substantially complies with the implied consent statute. Any error is harmless given the other evidence of impairment.

If this court answers the first question affirmatively, it need not reach the second certified question. However, if review of this question is necessary, it too should be answered in the affirmative. The implied consent statute merely creates a statutory shortcut for the admission of blood tests. If the state can establish that the test was performed by a qualified, yet uncertified, laboratory analyist, it has satisfied its traditional evidentiary burden for the admission of a scientific test. Once this traditional predicate is established, then the state may rely upon the implied consent statute to establish the remaining predicate, namely, the reliability of the test, the qualifications of the person who drew the blood, and the meaning of the test.

In addition to the certified questions, petitioner raises other issues presented on appeal to the district court, which that court determined did not "warrant discussion."

The state satisfied its threshold burden of introducing competent evidence, viewed in the light most favorable to the state, which is inconsistent with the defendant's theory of the events. The trial judge correctly ruled that the evidence presented a question for the jury to resolve.

No prejudice from nondisclosure of witness Duer can be demonstrated because the exact arguments appellant claims he was foreclosed from presenting in a pretrial motion to suppress were presented to the trial court and ruled upon the merits. These same claims are raised again on appeal.

There is no privilege for statements made during an accident investigation when the defendant leaves the scene of the accident. Candor and frankness in reporting is not advanced by extending the privilege to false statements.

POINT ONE

THE STATE ESTABLISHED SUBSTANTIAL COMPLIANCE WITH THE HRS RULES GOVERNING THE TESTING OF BLOOD FOR ALCOHOL TO COMPLY WITH THE IMPLIED CONSENT STATUTE. THE CERTIFIED QUESTIONS SHOULD BE ANSWERED AFFIRMATIVELY.

Robertson contends that the results of the blood alcohol test were improperly admitted because the person who actually performed the test, Dr. Wayne Duer, was not certified by HRS, but was merely supervised by a certified tester, Dr. Lynn Bowman. Respondent respectfully suggests that the state established substantial compliance with the applicable rules and regulations such that the results of the test were properly admitted. State v. Bender, 382 So.2d 697 (Fla. 1980); State v. Gilliam, 390 So.2d 62 (Fla. 1980).

The district court held that this testing procedure was in substantial compliance with section 316.1933, Florida Statutes, (1987). As an alternative basis for their holding, however, the court cited the decisions of State v. Strong, 504 So.2d 758 (Fla. 1987) and State v. Quartararo, 522 So.2d 42 (Fla. 2d DCA), pet. for rev. denied, 531 So.2d 1354 (Fla. 1988), which held that the test results were admissible without regard to the requirements of section 316.1933, provided the state could satisfy the traditional predicates for admissibility, including test reliability, the technician's qualifications, and the test results' meaning. The district interpreted Strong and Quartararo as creating "...a convenient shorthand evidentiary device for

admission of testing done in compliance with the statute..." The district court was unsure whether a failure of proof in one portion of the statute

> ...means the state must jump all the traditional evidentiary hurdles identified in Strong. For example, if the state can prove the person who performed the blood test was qualified even though uncertified, can the state use the certification or test validation components of the statute to establish the qualifications of the person who drew the blood, the validity of the test and/or the meaning of the test results? Id.

To resolve this important question, the court certified the following questions to this court for resolution.

> (A) MAY A CHEMICAL ANALYSIS PERFORMED IN ACCORDANCE WITH THE APPROVED METHODS CONTEMPLATED BY SECTION 316.1933 BE CONDUCTED UNDER THE SUPERVISION OF A PERMITTEE BY INDIVIDUALS NOT POSSESSING AN HRS PERMIT?
>
> (B) CAN THE STATE INTRODUCE INTO EVIDENCE TEST RESULTS OF BLOOD SAMPLES TAKEN AT THE REQUEST OF LAW ENFORCEMENT IF THE REQUIREMENTS OF SECTION 316.1933 ARE NOT SATISFIED? IF SO, UPON PROOF OF QUALIFICATION OF THE PERSON TAKING BLOOD OR CONDUCTING THE TEST, CAN THE STATE NONETHELESS RELY ON THE PROVISIONS OF SECTIONS 316.1933 TO PROVE A VIOLATION OF SECTION 316.193 OR MUST THE STATE INTRODUCE COMPETENT PROOF WHOLLY INDEPENDENT OF THE STATUTE?

Respondents note that if the first question is answered in the affirmative, there is no need to resolve the second question posed. If the test performed in this case under the supervision

of a permittee is substantial compliance with the statute, then this court need not consider to what extent and under what circumstances test results which are not in compliance with the statute are admissible.

A ruling on a motion to suppress is presumptively correct. Medina v. State, 466 So.2d 1046 (Fla. 1985). A trial court's order denying the suppression of evidence should not be overturned by an appellant court if there is any legal basis to sustain it. Sommer v. State, 465 So.2d 1339 (Fla. 5th DCA 1985).

The testimony adduced below was that Wayne Duer actually performed the test on petitioner's blood sample. Although Dr. Duer had been performing chemical tests for ten years and was certified by the Florida Department of Law Enforcement, he did not possess a license from HRS at the time the test was conducted. (R 136-127) Dr. Duer was supervised by Dr. Lynn Bowman, a licensed analyst who signed the report. (R 138, 145, 147) Duer testified that Bowman was in the same laboratory when be conducted the test, instructed him on the correct procedure and reviewed the results of the test. (R 143) Dr. Bowman testified that he supervised Dr. Duer, was "in the vicinity while the testing is going on", discussed the results of the tests with him and analyzed the results. (R 148) Such a supervisory role was described as "not uncommon." (R 149)

The district court reviewed the record on appeal and made the following findings of fact:

> Dr.Duer testified to his credentials at trial: a bachelor's degree in mathematics, a masters

> degree in organic chemistry and a doctorate in physical chemistry. He had formerly taught analytical chemistry at the University of Florida and had worked in racehorse blood analysis for the State Department of Business Regulation for ten years. He had been employed by the Florida Department of Law Enforcement (FDLE) since December, 1986, and had begun analyzing substances for alcohol content in July, 1988.
>
> Appellant's blood was received by Dr. Duer on July 6, 1988 and was tested on August 5, 1988....Dr Duer received his HRS permit on February 6, 1989. Robertson v. State, 15 F.L.W. 2721 (Fla. 5th DCA November 8, 1990)

The trial court and district court held that the supervision of Dr. Duer by a person who was certified by HRS, Dr. Bowman, was substantial compliance with section 316.1933, Florida Statutes, (1987). The state suggests that these holdings were correct, and request this court to answer the first certified question in the affirmative.

This holding is further supported by Rule 10D-42.029, the administrative rule governing the issuance of permits for blood alcohol testing. (See Petitioner's Appendix) This rule provides that each applicant for certification provide the "name and address of laboratory facility where applicant **performs** analyses," and a complete description of procedures in determining blood alcohol content. To qualify, the applicant must perform a controlled proficiency test analyizing blood alcohol, and either be licensed in clinical chemistry or possess a college degree in chemistry. By incorporating practical

experience and employment in a laboratory as a prerequisite to certification, HRS has implicitly sanctioned the supervision of a test conducted by a person not certified by a person who is certified.

The state further relies upon the case of Brown v. State, 389 So.2d 269 (Fla. 1st DCA 1980) by analogy to demonstrate that this procedure was not error. In Brown, the results of a gonorrhea test were ruled inadmissible because the doctor who testified to the results "...did not personally perform the tests, had no personal knowledge of who performed the tests, and was unaware of the process by which the samples left the hospital for a state laboratory and returned as test reports." Id. at 270. Conversely, in this case, the direct supervision of Bowman of a test he instructed Duer to perform, gave Bowman personal knowledge of the test, the process and the results.

Even if error to admit the results of the blood alcohol test, the verdicts should nonetheless be affirmed. The state argued in closing that it could establish the element of impairment two ways: by the blood alcohol test or by testimony that his normal faculties were impaired. (R 266) Several witnesses at the scene smelled alcohol on Robertson's breath, he was one of three persons seen around the truck immediately after the accident cleaning been cans from the vehicle, and he even admitted on the stand that he was intoxicated. Given this testimony of petitioner's impairment, any error in relying on the test is harmless. §924.33 Fla. Stat. (1989) The district court did not address this argument, but it provides an alternative ground for denying relief.

If this court determines that the supervision of a test by a permittee is in substantial compliance with the statute, or harmless in this case, there is no need to reach the second certified question. However, in the interest of completeness, the state argues that it too should be answered in the affirmative. The implied consent statute is not an absolute evidentiary requirement subject to exclusionary rule for noncompliance, but rather, a shortcut to the traditional avenue of establishing a predicate for a scientific test. If there is a weakness on one of the predicate issues, for instance if the person who tested the blood was not certified, although qualified, then the state can nonetheless rely on the traditional methods of establishing a predicate for the admissibility of evidence.

In State v. Bender, 382 So.2d 697. 699 (Fla. 1980), this court held that prior to the enactment of the implied consent statute, "...scientific tests of intoxication were admissible in evidence without any statutory authority if a proper predicate established that 1) the test was reliable, 2) the test was performed by a qualified operatio with the proper equipment, and 3) expert testimony was presented concerning the meaning of the test." The enactment of the statute was to ensure reliable scientific evidence. The court observed that other jurisdictions with similar statutes have held that noncompliance makes any test result inadmissible. However, the court did not hold that Florida has any such exclusionary rule for noncompliance. Indeed, the court observed that if the implied consent provision

is inapplicable, the results of blood tests are admissible without compliance with the administrative rules if the traditional predicate is established. Id. at 700.

State v. Gillman, 390 So.2d 62 (Fla. 1980), concerned a case where the medical technician who drew the blood was not licensed by the state, but had a letter from HRS authorizing him to work as a clinical laboratory technologist. The court held that this letter was a temporary license in accordance with section 483.141, Florida Statutes, (1979).

In 1987, this court decided State v. Strong, 504 So.2d 758 (Fla. 1987). In the Strong case, the blood was not drawn at the request of a law enforcement officer, but rather, by a noncertified laboratory technician for medical purposes. This court held that the implied consent statute was inapplicable. The results of the blood test were admissible upon establishing the traditional predicates for admissibility, including test reliability, the technician's qualifications, and the test results' meaning.

In State v. Quartararo, 522 So.2d 42 (Fla. 2d DCA), pet. for rev. denied, 531 So.2d 1354 (Fla. 1988), the same legal situation was presented as in this case: save for one element, the state established a predicate under the implied consent statute. The court held

> Drawing upon Strong for a similar conclusion under section 316.1933, the state posits that if a blood test otherwise qualifies for admissibility under the Schmerber rule and is proved to have been taken in a medically approved

> manner shown to be reliable for alcohol blood testing purposes, the tests should be admitted into evidence even if the sample was obtained in a nonstatutory manner. We agree with the state's reasoning.
>
> We do not believe that the legislature intended section 316.1933 to have the effect of an exclusionary rule requiring suppression of evidence which has been constitutionally obtained by the state. Id at 44

It is well established that the implied consent statute creates an evidentiary shortcut, but does not abolish the traditional method of establishing a predicate for the admission of reliable test results. It creates no exclusionary rule. In this case, both lower courts found that Dr. Duer was qualified to administer the blood test. The state has established substantial compliance with the statute, and in addition, has satisfied its traditional evidentiary burden. Robertson is not entitled to relief.

POINT TWO

THE TRIAL COURT CORRECTLY DENIED THE MOTION FOR JUDGMENT OF ACQUITTAL WHEN THE STATE INTRODUCED SUFFICIENT EVIDENCE FROM WHICH THE JURY COULD EXCLUDE EVERY REASONABLE HYPOTHESIS EXCEPT THAT OF GUILT.

Robertson was convicted as charge of DUI manslaughter and leaving the scene of an accident with injury. On appeal, he contends that the trial court improperly denied his motion for judgment of acquittal on both charges because the evidence was circumstantial and failed to exclude the reasonable hypothesis that he was not the driver of the vehicle. In addition, he contends that the evidence is insufficient that he left the scene of the accident as to that count. The trial court denied the motion at the close of the state's case and again after the defense rested, ruling that the evidence presented a jury question. (R 198, 223)

In State v. Law, 559 So.2d 187 (Fla. 1989), this Court held that the common law circumstantial evidence rule applies when the trial judge rules on a motion for judgment of acquittal. The evidence in this case was circumstantial that appellant was the driver of the vehicle. The court determined that application of the rule of circumstantial evidence did not run afoul of the standard of review expressed in Lynch v. State, 293 So.2d 44 (Fla. 1974), which requires all facts and inferences reasonably inferred from those facts to be viewed in the light most favorable to the state when ruling on a motion for judgment of acquittal. The Court harmonized these competing principles as follows:

> A motion for judgment of acquittal should be granted in a circumstantial evidence case if the state fails to present evidence from which the jury can exclude every reasonable hypothesis except that of guilt. See, Wilson v. State, 493 So.2d 1019, 1022 (Fla. 1986) Consistent with the standard set forth in Lynch, if the state does not offer evidence which is inconsistent with the defendant's hypothesis, the evidence [would be] such that no view which the jury may lawfully take of it favorable to the [state can be sustained under the law. 293 So.2d at 45. The state's evidence would be as a matter of law insufficient to warrant a conviction. Fla.R.Crim.P. 3.380.
>
> It is the trial judge's task to *review* the evidence to determine the presence or absence of competent evidence from which the jury could infer guilt to the exclusion of all other inferences. That view of the evidence must be taken in the light most favorable to the state. The state is not required to rebut conclusively every possible variation of events which could be inferred from the evidence, but only to introduce competent evidence which is inconsistent with the defendant's theory of events. Once that threshold burden is met, it becomes the jury's duty to determine whether the evidence is sufficient to exclude every reasonable hypothesis of innocence beyond a reasonable doubt. (citations omitted) Id. 188-189.

Respondent contends that the state met its threshold burden of introducing competent evidence, viewed in the light most favorable to the state, which is inconsistent with the Robertson's theory of the events. The trial judge correctly

ruled that the evidence presented a question for the jury to resolve.

The circumstantial evidence that Robertson was the driver was compelling. He was the registered owner of the vehicle. There were three people in the truck when the accident occurred. The injury to the three people and the resulting areas of impact on the vehicle provide circumstantial evidence that appellant was the driver. The cracks in the windshield indicated that the two passengers hit their heads upon impact. The other men were both wearing long pants while the defendant was in shorts. The other men both had injury to their foreheads and knees, which corresponded to the windshield cracks and impressions in the dash. Red paint which covered the other two people's pants was transferred to the dash. Conversely, the defendant had no visible head injury, but had injury to his ankle which corresponded to tissue and blood on the brake pedal.[1] Blue paint was observed on the defendant's arm and blue paint was also observed on the steering wheel, in an area consistent with the conclusion that the defendant's arm transferred the paint to the wheel.[2] This circumstantial evidence is inconsistent with the

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[1] Although appellant argues that Trooper Peck was not qualified to render an opinion that this substance was human tissue, no objection whatsoever was posed to this testimony below. Moreover, pictures of the pedal and the tissue were introduced into evidence without objection.

[2] The blood and paint was note tested as a Petitioner suggest because there was no known sample to compare it to once the other two men were releaseed.

petitioner's theory of events. Therefore, the trial court properly submitted the case to the jury. State v. Law, supra.

Additionally, petitioner contends that the evidence was insufficient to establish that he willfully left the scene of the accident. The state understands his argument on this point to be that his close proximity to the scene was the legal equivalent of being at the scene, and not as suggesting that his actions were not willful. If Robertson is contesting the willfulness of his actions, the motion for judgment of acquittal was properly denied. See, Brewer v. State, 423 So.2d 1217 (Fla. 5th DCA 1982) Otherwise, the evidence was sufficient to create a jury question of whether his location when found lying in the weeds was at the scene or not. The testimony from the officer was that he was found "a short distance from the scene..." (R 47) His exact location was in a ditch, in tall grass, 50 to 100 feet from the "scene" and 20 feet off the roadway. (R 47) This direct evidence was sufficient to create a jury question of whether this location was far enough away from the accident with injury. As such, the motion for judgment of acquittal was properly denied.

POINT THREE

THE TRIAL COURT CONDUCTED AN ADEQUATE RICHARDSON INQUIRY AND MADE A CORRECT FINDING THAT APPELLANT WAS NOT PREJUDICED.

Petitioner concedes that the trial court conducted a proper and thorough hearing once the nondisclosure of witness Wayne Duer came to light. Duer was the understudy that actually performed the analysis on petitioner's blood under the direction of Dr. Lynn Bowman. Dr. Bowman signed the report, and it was not until mistrial that the state learned that Duer and not Bowman performed the BAL test. The court conducted a prompt and full hearing and made all the requisite findings. (R 154) Petitioner contends that the court failed to adequately assess the potential prejudicial impact on the defense case. He contends that this prejudice is that he could have moved pretrial to exclude the results of the test because Duer was not certified by HRS, and further, that the variance between two tests performed rendered the results unreliable.

The court permitted the defense to depose Duer. The state contends that the lack of prejudice is highlighted by the fact that these exact arguments were raised below, and are advanced as error on appeal. (see, point one) How can petitioner demonstrate prejudice when he made the very arguments he claims were foreclosed by the non disclosure? The court did not deny the motion to suppress because it should have been made pretrial, but rather, denied the motion on the merits. The trial court did not abuse its discretion in determining that no prejudice was suffered by the nondisclosure of witness Duer.

POINT FOUR

THE TRIAL COURT PROPERLY ADMITTED APPELLANT'S STATEMENT BECAUSE HE WAIVED ANY PRIVILEGE BY LEAVING THE SCENE OF THE ACCIDENT.

While receiving medical treatment, Robertson told the homicide investigator that, "I was just walking down the side of the road and I got hit..." (R 63) Petitioner contends that the trial court improperly overruled his objection that this statement was privileged under section 316.066(4), Florida Statues (1989).

The two cases cited to the trial court were State v. Ferguson, 405 So.2d 294 (Fla. 4th DCA 1981) and State v. Hepburn, 460 So.2d 422 (Fla. 5th DCA 1984). These cases both hold that the purpose of the privilege is to promote candor in making accident reports. This purpose is not advanced by protecting the admission of false statements. At trial, Robertson testified that he was not the driver, but a passenger, not that he was a pedestrian. Therefore, his statement to the officer was false. Ferguson holds that this privilege does not apply to persons who abandon their duty to accurately report traffic accidents by leaving the scene of the accident. Robertson was convicted of leaving the scene of an accident with injury. Therefore, the trial court correctly admitted the statement. Even if error, any error was harmless. Kornegay v. State, 520 So.2d 681 (Fla. 1st DCA 1988)

CONCLUSION

Based on the arguments and authorities presented herein, respondent respectfully request this honorable court affirm the judgment and sentence of the trial court in all respects, and to answer certified questions in the affirmative.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing answer brief has been furnished by delivery to Assistant Public Defender Michael S. Becker counsel for petitioner, at 112 N. Orange Ave., Daytona Beach, Florida 32114, this 29th day of January, 1990. BT

Belle B. Turner

Of Counsel