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FILED
SID J. WHITE
DEC 24 1992
CLERK, SUPREME COURT
By _____ Chief Deputy Clerk

IN THE SUPREME COURT OF THE STATE OF FLORIDA

DAVID JOSEPH MEHL,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO.: 80,492

District Court of Appeal
5th District - No. 91-186

PETITIONER'S REPLY BRIEF ON THE MERITS

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STATEMENT OF THE FACTS AND CASE

The Defendant readopts the Statement of the Facts and Case contained in his Initial Brief on the Merits.

SUMMARY OF ARGUMENT

The judgment of the Fifth District Court of Appeal should be reversed, and the order of the trial court upheld, because:

1) The district court erred in holding that the Department of Health and Rehabilitative Services (HRS) had substantially complied with the requirements of s. 316.1932(1)(f) by adopting the rules for blood testing contained in rules 10D-42.028-.030 of the Florida Administrative Code.

2) The district court erred in holding that the requirements of s. 316.1933 applied to the Defendant's case instead of s. 316.1932 and that under s. 316.1933 HRS was not required to promulgate rules providing an approved method of administration for blood tests performed pursuant thereto.

ARGUMENT

In its opinion, the Fifth District Court of Appeal certified two questions of great public importance to this Court:

> CAN THE STATE INTRODUCE INTO EVIDENCE PURSUANT TO SECTION 316.1934 BLOOD SAMPLE TESTS RESULTS EVEN THOUGH HRS HAS NOT ADOPTED RULES GOVERNING TESTING AND MAINTENANCE OF EQUIPMENT APPROVED FOR USE IN THE TESTING OF BLOOD SAMPLES?
>
> CAN THE STATE INTRODUCE INTO EVIDENCE PURSUANT TO SECTION 316.1934 BLOOD SAMPLE TEST RESULTS CONDUCTED IN ACCORDANCE WITH THE HRS RULES PROMULGATED AS 10D-42.028, *ET SEQ.*?

The State contends that "[t]he answers to these questions do not affect the propriety of the District Court's reversal of the suppression order because the District Court had also reversed the trial court's suppression order based upon the trial court's failure to afford the State the opportunity to introduce the blood test results using traditional evidentiary techniques." The State seems to imply that the district court's opinion, which articulated several alternate bases for reversal, renders these questions of little public importance. The Defendant would submit that these questions are important.

As the State correctly points out, the district court held that "the trial court erred in not affording the state an opportunity to attempt to introduce the defendant's blood test results using traditionary evidentiary techniques." ***State v. Mehl***, 17 FLW D1952, D1953 (Fla. 5th DCA Aug. 21, 1992). While the State may attempt to introduce the test results under ***Robertson v. State***, 17 FLW S454 (Fla. July 16, 1992), and ***State v. Bender***, 382 So.2d 697 (Fla. 1980), the district court's reversal on this basis by no

means indicates that the State will be successful in its attempt to introduce the results. If this Court's answers to the two certified questions are in the affirmative, however, on remand the State will receive the benefit of a statutory presumption of admissibility. This presumption is critical to one in Defendant's position because, once the test result is admitted, another presumption arises under s. 316.1934(2)(c) that the defendant was under the influence if the test result is 0.10 percent or more. It is Defendant's contention that, because of the failure of HRS to adopt rules approving the methods to be followed in administering blood tests under the implied consent statute, the State should not be entitled to any presumption.

In arguing that HRS had complied with the statute, the State cited this Court to the arguments made by the district court in its opinion. Defendant has already addressed these arguments in his Initial Brief on the Merits. Section 316.1932(1)(f)1. requires HRS to adopt rules and regulations providing an approved method of administration of blood tests performed pursuant to that statute. The legislature has articulated no rational basis to distinguish between tests performed pursuant to s. 316.1932 and those performed pursuant to s. 316.1933. In fact, the same HRS rules and regulations apply to both statutes.

The evidence at the hearing was undisputed. HRS has promulgated Rule 10D-42.028 authorizing two types of blood tests, enzymatic and gas chromatographic. (Tr. 26) While this rule meets the requirement of s. 316.1932(1)(f)1. that HRS "specify precisely

the tests or tests which are approved," the rule fails to meet the requirement of s. 316.1932(1)(f)1. that HRS approve the method of administration for these tests. The requirement of specifying the approved tests and the requirement of approving the method of the tests' administration under the statute are not the same requirement but, in fact, are listed separately.

In addition, Rule 10D-42.0211 of the Florida Administrative Code defines methods as "a set of instructions detailing the proper operation of an instrument or the procedure used to analyze for a specific compound." While Rule 10D-42.028, authorizing two procedures for the testing of blood, may enumerate the approved procedures, the rule does not contain instructions detailing these procedures or the proper operation of any instruments used in performing such procedures.

The evidence at the hearing indicated that, under HRS procedure, the permit applicant prescribes the method of administration, subject to HRS approval. (Tr. 25-26) A procedure whereby HRS allows the individual permittee to prescribe his own method of administration, which HRS may then approve or not approve, cannot meet the statute's requirement that HRS adopt rules providing approved methods to be followed by those performing the tests. Contrary to the State's suggestion, Defendant would submit that this complete failure on the part of HRS to comply with the statutory directives can hardly be characterized as a minor deviation from the statutory guidelines, as referred to by this Court in ***Robertson***, supra, and ***State v. Donaldson***, 579 So.2d 728

(Fla. 1991). See also **State v. Peters**, 729 S.W.2d 243 (Mo.App. 1987) (where a similar process was struck down).

The State argues that the current procedures utilized by HRS do not compromise the reliability of the tests performed. Defendant would argue that a system of performing specified tests, without any articulation of the specific standards or methods of administering such tests, is inherently unreliable. In any event, if, as the State argues, the current HRS procedures do ensure the reliability of the test results, then this is a matter for the State to establish when it attempts upon remand to introduce the results using the traditional evidentiary predicates. The fact remains that HRS has failed, as required by statute, to formally articulate the approved methods of administration for such tests. Under these circumstances, the State should not enjoy the presumption of admissibility which the statute affords upon compliance therewith.

CONCLUSION

Based on the foregoing, Defendant respectfully requests this Court to reverse the decision of the district court holding that HRS has complied with the requirements of s. 316.1932(1)(f) by adopting Rules 10D-42.028-.030 of the Florida Administrative Code and holding, alternatively, that under s. 316.1933 HRS was not required to promulgate rules providing an approved method of administration for blood tests performed pursuant thereto.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to: Anthony J. Golden, Assistant Attorney General, 210 North Palmetto Avenue, Suite 447, Daytona Beach, Florida 32114 on this 22nd day of December, 1992.

By: _____

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