THE SUPREME COURT OF FLORIDA

MICHAEL J. VEILLEUX, Petitioner,	:	
vs.	:	Case No. 80,767
STATE OF FLORIDA, Respondent.	:	

APPEAL FROM THE DISTRICT COURT OF APPEAL,
SECOND DISTRICT
STATE OF FLORIDA

INITIAL BRIEF OF PETITIONER

ROBERT N. HARRISON, ESQ.
Kanetsky, Moore & DeBoer, P.A.
227 Nokomis Avenue South
Venice, Florida 34285
(813) 485-1571
Counsel for Petitioner

TABLE OF CONTENTS

Table of Citations

STATEMENT OF THE CASE AND FACTS

MICHAEL J. VEILLEUX, Petitioner, Appellee below, submitted to a breath test on an Intoxilyzer 5000 breath testing instrument after being arrested for driving under the influence of an alcoholic beverage. VEILLEUX filed a Motion in Limine to exclude from evidence the results of this breath test on the basis HRS rules failed to provide procedures to ensure accuracy and reproducibility of the breath testing machines. (R229-231). A hearing on VEILLEUX'S Motion was held before the HONORABLE BARBARA BRIGGS in Sarasota County on June 27, 1991. (R1-152). VEILLEUX'S Motion was granted and the STATE appealed. The Second District Court of Appeal reversed the County Court's Order and this appeal ensued.

The STATE called as a witness BERNARD JUSTICE, who works for HRS as an alcohol breath testing inspector in the Sarasota area (R10-11). MR. JUSTICE testified that in 1982, when Rule 10D-42 was passed, Form 1514 (commonly known as the monthly maintenance form), was incorporated and attached to the Rules. (R12-13). MR. JUSTICE further testified that in 1986, a new version of Form 1514 was created. (R14). The 1986 version of Form 1514 is the form used for the subject machine. (R15). MR. JUSTICE stated that the new form was never promulgated officially by HRS (R16), but the only difference between the two forms were a HRS logo on the 1986 version, along with three additional blanks for acitone results. (R17-19). Neither version of Form 1514 provides: the procedure to be used for monthly maintenance, the proper blood alcohol level to

be used to test the machine, nor the acceptable margin of error to be applied. (R68-69). Nowhere in the HRS rules is the procedure used for monthly inspections. (R69). The procedure which is used was the result of staff meetings and were not promulgated after a public hearing. (R70).

MR. JUSTICE testified for the annual inspections, HRS uses Form 713. (R74). Unlike Form 1514 used for monthly inspections, Form 713 was not referred to in the rules which were promulgated after a public hearing. (R74). The procedure used for the annual inspection was arrived at during a HRS staff meeting, rather than a public hearing. (R75).

MR. JUSTICE testified the only definition for accuracy contained in the HRS rules is in the requirements for initial certification of the machine. (R67). He further stated the machine must be tested for accuracy at each stage (monthly and annual inspections). (R67). He initially testified that the HRS standards are met at these stages. (R67). However, on cross-examination, MR. JUSTICE conceded that the procedures used to check the machine annually and monthly is different than the procedure used for initial certification of the machine. (R71-72, 96). The initial certification requires testing of 175 samples (R92) at blood alcohol levels of .00, .05, .10 and .15. (R95). The monthly maintenance tests three samples of breath (R91) at levels of .10, .20, and .10 with acitone. (R95). The annual maintenance tests 25 samples of breath (R92) at levels of .00, .05, .10, and .20.

(R95). MR. JUSTICE admitted that a testing of 175 samples would give a "better picture" of accuracy than 25 samples, which in turn is better than three samples. (R94). The trial court specifically found in paragraph 5 of the Amended Order in Limine "the standard for reliability used by HRS at the monthly and annual inspections is lower than the standard required under Rule 10D-42.022 for the initial certification. Namely, the initial certification requires 175 samples, while the annual and monthly checks require only 25 and 3, respectively." (R279).

The trial court granted VEILLEUX'S Motion, and certified the decision to the Second District Court of Appeals. The District Court reversed the County Court's decision, but certified the following questions to this Court:

> I. DOES THE COUNTY COURT HAVE SUBJECT MATTER JURISDICTION? MUST THE APPELLEES SEEK ADMINISTRATIVE RELIEF PRIOR TO OBTAINING JUDICIAL DETERMINATION OF THEIR CLAIMS?
>
> II. DOES THE FAILURE OF HRS TO PROMULGATE A RULE, AFTER PUBLIC HEARING, WHICH COULD PROVIDE A TEST FOR RELIABILITY AT THE MONTHLY AND ANNUAL INSPECTIONS PRECLUDE THE STATE'S USE OF BREATH TESTING RESULTS IN A CRIMINAL TRIAL?
>
> III. WHEN A DEFENDANT CONSENTS TO AN APPROVED CHEMICAL TEST, BUT IS GIVEN A NON-APPROVED TEST, MAY THE STATE INTRODUCE EVIDENCE OF THE NON-APPROVED TEST BY ESTABLISHING THE TRADITIONAL PREDICATE FOR THE INTRODUCTION INTO EVIDENCE OF SCIENTIFIC EVIDENCE?

Five other Defendants who had filed similar motions were consolidated with VEILLEUX'S Motion at the County Court and District Court of Appeals, but only VEILLEUX has sought review before this Court.

SUMMARY OF THE ARGUMENT

The County Court has jurisdiction over prosecutions for violating § 316.193, Florida Statutes (D.U.I.). Pursuant to this Jurisdiction, the County Court can make determinations as to the admissability of evidence. Here, the County Court properly exercised its jurisdiction in determining the admissibility of evidence (breath results) in a prosecution for D.U.I.

Section 316.1932(1)(f) 1, Florida Statutes requires HRS to adopt, after a public hearing, a test for reliability of result of breath testing devices. A public hearing was held where HRS adopted rules which required the machines to be initially certified; these rules provided precisely the procedure of how the machines would be tested for reliability. Additionally, these rules called for monthly and annual testing for reliability, but gave no guidance as to what procedure to use. The procedure used by HRS was adopted after a staff meeting, but not after a public hearing. Additionally, this procedure allows for a standard of reliability lower than the standard required by HRS rules for initial certification. Without a valid test for reliability of result, breath results are inadmissible under § 316.1932.

The Defendant's consent to the test by statute was only implied for an approved breath-testing device. The subject breath test could only be an approved test with compliance with the Statute and HRS rules, which did not occur. Therefore, the Defendant did not impliedly consent to the instant breath test, and use

of the results of these tests are inadmissible during the Defendant's trial.

ARGUMENT

ISSUE I

DOES THE COUNTY COURT HAS SUBJECT MATTER JURISDICTION? IS THE DEFENDANT REQUIRED TO SEEK ADMINISTRATIVE RELIEF PRIOR TO OBTAINING JUDICIAL DETERMINATION OF HIS CLAIM?

The Second District Court of Appeal correctly found that the County Court properly asserted jurisdiction to suppress blood alcohol evidence solely on the basis of its finding that HRS had adopted no rules and regulations for the method of administration of the blood alcohol test. The Second District followed the sound opinions of its sister District Court's decisions in State v. Reisner, 584 So.2d 141 (Fla. 5th DCA), rev. den. 591 So.2d 184 (Fla. 1991) and State v. Burke, 599 So.2d 1339 (Fla. 1st DCA 1992), along with following the rationale of this Court's decision in Anderson v. State, 267 So.2d 8 (Fla. 1972). This Court stated every Court has inherit powers to do all things that are reasonably necessary for the administration of justice within the scope of its jurisdiction, subject to, or not in conflict with valid existing laws and constitutional provisions. Id. at 10.

As to the first certified question, does the County Court have subject matter jurisdiction, this Court should answer in the affirmative, and the second part of the question, must the Appellees seek administrative relief prior to obtaining judicial determination of their claims in the negative and affirm the decision of the Second District as it relates to the first certified question.

ISSUE II

DOES THE FAILURE OF HRS TO PROMULGATE A RULE, AFTER PUBLIC HEARING, WHICH COULD PROVIDE A TEST FOR RELIABILITY AT THE MONTHLY AND ANNUAL INSPECTIONS PRECLUDE THE STATE'S USE OF BREATH TESTING RESULTS AT A CRIMINAL TRIAL?

A breath test determining the weight of alcohol in a person's blood shall be administered substantially in accordance with the rules and regulations which have been adopted by the Department of Health & Rehabilitative Services (hereinafter HRS). § 316.1932(1)(f)1, Fla. Stat. These rules and regulations shall be adopted after public hearing, shall specify precisely the test or tests which are approved by HRS for reliability of result and facility of administration, and shall provide an approved method of administration which shall be followed in all tests given under this section. Id. Pursuant to this statute, HRS enacted two rules: Florida Administrative Code, Rule 10D-42.023 and 10D-42.024. (Hereinafter cited as HRS Rules). HRS Rule 10D-42.023 provides in part:

> All such chemical test, instruments or devices registered hereunder shall be checked at least once each calendar year for accuracy and reproducibility.

HRS Rule 10D-42.024(1)c provides:

> Chemical tests, instruments and devices used in the breath test method shall be inspected at least once each calendar month by a technician to insure general cleanliness, appearance and accuracy.

In an attempt to follow the statutory mandate of § 316.1932(1)(f)1, Florida Statutes, HRS enacted the above mentioned

rules. These rules fail to comply with the statute; they require the machines to be tested for "accuracy" and "reproducibility", but nowhere is there any guidance as to what must be done to ensure "accuracy" or "reproducibility". The statute requires that the rules specify precisely the test or tests which are approved by HRS for reliability. § 316.1932(1)(f)1, Fla. Stat.

HRS Rules 10D-42.023 and 10D-42.024, which were adopted after a public hearing, require tests to be made on the breath testing devices to ensure accuracy and reproducibility, but fail to precisely provide a procedure for this testing. HRS has subsequently adopted a procedure for the monthly and annual checks. However, this procedure was not adopted after a public hearing as required by § 316.1932(1)(f)1, Florida Statutes. (R 69-70, 82, 92-93). During the hearing below, the State presented evidence of this testing procedure. (R 61-67). However, the procedure which is used to test for accuracy is not uniform throughout the State. (R 111-112). Uniformity is required by § 316.1932(1) (f)1, Florida Statutes, which states that the approved method "shall be followed in all such tests given under this section". The State is not in compliance with § 316.1932(1)(f)1, Florida Statutes, because the test for accuracy and reproducibility was not presented at public hearing and because there is no assurance that all tests given under § 316.1932(1)(f)1, Florida Statutes, will follow the same procedure.

This issue was addressed by the Fifth District Court of Appeals in State v. Reisner 504 So. 2d 141. Certified to the Fifth

District was the question "[d]o the current methods of HRS' monthly and yearly maintenance accuracy check comply with requirements of Section 316.1932(1)(f)(1) (sic), Florida Statutes, and/or the Florida Administrative Procedures Act, Section 120.50, et seq., Florida Statutes, if not, does this preclude the State's use of breath testing instruments in a criminal trial?" The Fifth District answered these questions no and yes. Id. at 142. The court discussed separately the two HRS rules, 10D-42.023 and 10D-42.024. The court held that 10D-42.024, which dealt with monthly inspections, initially met the requirements of the statute by incorporating Form 1514 into the rule which gave a sufficiently specific requirement of testing for accuracy and reproducibility. However, HRS no longer uses the original Form 1514 and now uses a revised Form 1514 which was not adopted after a public hearing. The court rejected the State's argument that the revised form is also a rule, holding unpromulgated rules are not accepted for this purpose and affirmed the suppression of the Breath test results. Id. at 144-145.

The Second District Court of Appeal below distinguished the facts of the instant case with Reisner, due to the testimony of BERNARD JUSTICE. Based upon MR. JUSTICE'S testimony, the District Court ruled the difference between the 1982 Form 1514 and the 1986 Form 1514 were insubstantial and did not affect the reliability of the tests. However, the District Court failed to address the threshold issue. HRS Rule 10D-42.02(1)(c) requires the machines to be inspected once each month to insure accuracy. Form 1514 only

provides blanks to be filled out for three tests. Neither the form nor the rule provides: the procedure to be used for monthly maintenance, the proper blood alcohol level to be used to test the machine, nor the acceptable margin or error to be applied. (R68-69). The fact that the 1986 Form is similar to the 1982 Form (which was adopted after a public hearing), does not solve the problem that Florida Statutes §316.1932(1)(f)1 is not complied with; this statute provides in part "[s]uch rules and regulations shall be adopted after public hearing, shall specify precisely the test or test which are approved by the Department of Health and Rehabilitative Services for reliability of result and facility of administration...." Not only do the HRS rules and Form 1514 fail to specify precisely test, they fail to specify any procedures at all. The procedure used by HRS is one adopted at staff meetings (R70) which violates Florida Statutes §316.1932(1)(f)1 which require the procedure to be adopted after a public hearing.

Rule 10D-42.023, which provides for annual inspections, does not incorporate a form as does Rule 10D-42.024 (monthly maintenance). Instead, HRS merely adopted a form without a public hearing which is used for the annual inspections. This is Form 713. Once again, the procedure which is used by HRS was adopted at staff meetings and not promulgated after a public hearing. (R75). In order to comply with Florida Statutes §316.1932(1)(f)1, the HRS rules need to specify precisely the tests for reliability. HRS has failed to do so.

The Second District Court of Appeals, in reversing the trial court, failed to address the problem with the annual inspections. The District Court based its decision solely on the Reisner dicta which stated no expert was produced to explain that any deviation used by the two forms (1982 and 1986 versions of 1514) was insubstantial or unimportant. Reisner at 145. After addressing the monthly maintenance tests, the District Court needed to address the annual maintenance tests, but failed to. Form 713 was never promulgated after a public hearing. There is not an old version of the form which was enacted with the original rules after a public hearing. Rule 10D-04.023 requires all instruments to be checked once each year for accuracy, but fails to establish the procedure to test for accuracy. Because of the total absence of any form or procedure for the annual inspection which was properly promulgated after a public hearing, the Fifth District held "the rule for annual checks was unconstitutionally vague." Reisner at 145.

The State attempted to establish that the machines were tested at the monthly and annual inspections using the same procedure for testing for accuracy during the initial certification of the machine. The procedure for initial certification is provided in Rule 10D-42.022. However, the State's expert admitted the procedure used to check the machines annually and monthly is different than the procedure used for initial certification. (R71-72, 96). The initial certification requires inspectors to test 175 samples, where only 25 such samples are used annually and three samples for

the monthly check. (R91-92). The initial certification requires the machine to be tested at four specific blood alcohol levels, but neither the monthly nor annual checks use all four levels. The annual inspection uses three of four levels required for the initial certification and the monthly inspection only uses one of these levels. (R95). The initial certification requires the machine to be tested at a level of .15, but this level is never required in the monthly or annual checks. (R95). The procedure adopted at the HRS staff meetings for monthly and annual inspections is quite different than the procedure required by the HRS rules for initial certification. The trial court, after hearing the State's expert testify, specifically found "[t]he standard for reliability used by HRS at the monthly and annual inspections is lower than the standard required under Rule 10D-42.022 for initial certification. Namely, the initial certification requires 175 samples, while the annual and monthly checks require only 25 and 3, respectively." (R279).

The failure of HRS to properly promulgate a rule for testing the accuracy and reproducibility of the breath test is analogous to the failure of the Florida Game and Fresh Water Fish Commission (hereinafter Commission) to properly promulgate rules as required by § 372.922, Florida Statutes. The issue was discussed by this Court in State v. Cumming, 365 So. 2d 153 (Fla. 1978). In Cumming, Cumming was charged with the possession of an ocelot without a permit. Section 372.922, Florida Statutes, directed the Commission to create regulations to insure that permits from the

Commission are "granted only to persons qualified to possess and care properly for wildlife," and that wildlife possessed as personal pets "will be maintained in sanitary surroundings and appropriate neighborhoods." Florida Administrative Code Rules 16E-5.051 and 5.052 are the regulations promulgated by the Commission pursuant to the mandate of § 372.922, Florida Statutes, for implementing the guidelines of the statute. These rules do not sufficiently define the standards upon which a permit is to be granted or defined. The rules do not define what is a "qualified person," what are "sanitary conditions," or what constitutes an "appropriate neighborhood". This Court held that § 372.922, Florida Statutes, "cannot be applied constitutionally. Without a valid permit procedure being available to owners of wildlife covered by the statute, no prosecution for lack of permit is possible." Id. at 156. Likewise, § 316.1932(1)(f)1, Florida Statutes, cannot be applied constitutionally without a valid procedure to test the breath testing devices for accuracy and reproducibility.

Clearly § 316.1932(1)(f)1, Florida Statutes, requires HRS to adopt after public hearing a rule which shall specify precisely the test to be used to ensure reliability of result and facility of administration of breath machines. The procedure used by HRS in the instant case to test these machines is not part of a rule adopted after a public hearing. Because HRS failed to promulgate this procedure as a rule after a public hearing, the State is precluded from the use of breath testing results in the defendant's

trial. According, this Court should answer the second certified question in the affirmative.

ISSUE III

WHEN A DEFENDANT CONSENTS TO AN APPROVED CHEMICAL TEST, BUT IS GIVEN A NON-APPROVED TEST, MAY THE STATE INTRODUCE EVIDENCE OF THE NON-APPROVED TEST BY ESTABLISHING THE TRADITIONAL PREDICATE FOR THE INTRODUCTION INTO EVIDENCE OF SCIENTIFIC EVIDENCE?

In this cause, VEILLEUX, pursuant to the implied consent law, consented to an approved breath test. However, as discussed above, HRS did not comply with Florida Statutes §316.1932(1)(f)1. Thus the test submitted to was not an approved test.

The State sought a ruling from the trial court as to whether the results of the breath test could be admitted by establishing the traditional predicate for the introduction into evidence of scientific tests. The trial court ruled: "[w]ithout a valid test for reliability on a monthly or annual basis, the Intoxilizer 5000 cannot be considered an approved breath testing device. The Defendants only impliedly consented to a test from an approved breath testing device pursuant to Florida Statutes 316.1932." (R279-280).

The County Courts analysis was almost identical to the subsequent opinion issued by the First District Court of Appeals in State v. Polak, 598 So.2d 150 (Fla. 1st DCA 1992). The District Court stated "because the intoximeter here was not an "approved" instrument, as required by section 316.1932(1)(a), the tests given to the defendants cannot be considered "approved" tests. As their consent was based on misinformation, namely, that their licenses would be suspended for failure to submit to an unapproved test, the

defendants' consent cannot be deemed voluntary pursuant to the Burnett rule." Id. at 153-154. Also see State v. Burnett, 536 So.2d 375 (Fla. 2d DCA 1988). Accordingly, the third certified question should be answered in the negative.

CONCLUSION

In conclusion, the Legislature has tried to ensure the accuracy of blood alcohol level testing and uniformity in testing throughout the state by enacting § 316.1932(1)(f)1, Florida Statutes. However, VEILLEUX has not had the benefit of the statute's protection. No specific procedures for accuracy checks or standards of performance were established by the STATE as required by § 316.1932(1)(f)1, Florida Statutes. Because HRS failed to comply with the Statutes, the breath test which VEILLEUX submitted to cannot be considered to be an approved test. VEILLEUX was falsely told the test he was submitting to was an approved test, thus his consent cannot be deemed voluntary and the STATE is precluded from establishing the results of the breath test by establishing a traditional predicate for the introduction of scientific evidence.

Accordingly, the first part of the first certified question should be answered yes and the second part answered no. The second certified question should be answered yes and the third question no.

Respectfully submitted:

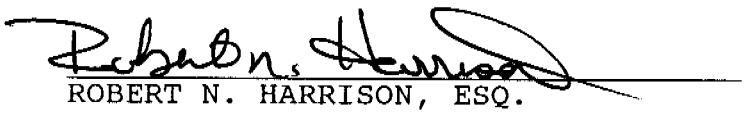
KANETSKY, MOORE & DeBOER, P.A.

By: 

ROBERT N. HARRISON, ESQ.
P. O. Box 1767
227 Nokomis Avenue South
Venice, FL 34284-1767
(813) 485-1571
Florida Bar No. 612545
Counsel for Michael Veilleux

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U. S. Mail to STEPHEN BAKER, Assistant Attorney General, Westward Center, Suite 700 2002 North Lois Avenue, Tampa, Florida 33607-2366; on this 18th day of January, 1993.



ROBERT N. HARRISON, ESQ.