017

FILED
SID J. WHITE
MAR 29 1993
CLERK, SUPREME COURT
By Chief Deputy Clerk

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

REPLY 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

	Page No.
Table of Citations	ii
Statement of the Case and Facts	iii
Summary of the Argument	iv
Argument	1
ISSUE I	1
DOES THE COUNTY COURT HAVE SUBJECT MATTER JURISDICTION? IS THE DEFENDANT REQUIRED TO SEEK ADMINISTRATIVE RELIEF PRIOR TO OBTAINING JUDICIAL DETERMINATION OF HIS CLAIM?	
ISSUE II	3
DOES THE FAILURE OF HRS TO PROMULGATE A RULE, AFTER A 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?	
ISSUE III	6
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?	
CONCLUSION	7
CERTIFICATE OF SERVICE	8

Table of Citations

Cases — Page No.

Dania Jai-Alai Palace, Inc. v. Sykes,
450 So.2d 1114 (Fla. 1984) iii

Drury v. Harding,
443 So.2d 360 (Fla. 1st DCA 1983)
(aff'd on other grounds, 461 So.2d 104 (Fla. 1984) . . 3, 4

State v. Bender,
382 So.2d 697 (Fla. 1980) 1

State v. Fardelman,
453 So.2d 1183 (Fla. 5th DCA 1984),
rev. denied, 462 So.2d 1106 (Fla. 1985) 3, 4

Statutes and Rules

F.S. §34.01(1)(a) 1
F.S. §316.1932(1)(f)1 iv
Fla. R. App. P. 9.210(c) iii

STATEMENT OF THE CASE AND FACTS

The Respondent in their Answer Brief filed a four and one-half page Statement of the Case and Facts. The Respondent failed to state if there were any areas of disagreement of the Statement of the Case and Facts cited to by the Petitioner in the Initial Brief as is required by Florida Rule of Appellate Procedure 9.210(c). Also see Dania Jai-Alai Palace, Inc. v. Sykes, 450 So.2d 1114, 1122, (Fla. 1984). Because the Respondent failed to cite any areas of disagreement of the Petitioner's Statement of the Case and Facts, the Petitioner is proceeding based upon the assumption that the Respondent is accepting the Statement of the Case and Facts as provided in the Petitioner's Initial Brief. Accordingly, the Petitioner is filing a separate motion to strike this portion of the Respondent's Brief for failure to comply with the Florida Rules of Appellate Procedure.

SUMMARY OF THE ARGUMENT

The County Court, in asserting its jurisdiction to hear a misdemeanor case, must make determinations of admissability of evidence in the trial. A predicate for the admissability are the results of a breathalyzer test is that HRS complied with the statutory requirements. Pursuant to this jurisdiction, the County Court held an evidentiary hearing and properly determined that HRS had not complied with the statutory requirements of Florida Statutes §316.1932(1)(f)1.

ISSUE I

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

The County Court properly asserted jurisdiction to determine the admissibility of the breathalyzer results in the Petitioner's trial. The State contends the Petitioner could not challenge the non-compliance of the Department of Health and Rehabilitative Services (hereinafter HRS) in enacting the rules regulating the breathalyzer tests in the County Court, for administrative remedies were not exhausted and the County Court did not have jurisdiction.

The County Court did not assert jurisdiction in this cause to address administrative rules. The Court asserted jurisdiction over the prosecution of a misdemeanor, which was instituted by the State. F.S. §34.01(1)(a). The State intended to introduce into evidence the results of a breathalyzer test during the Petitioner's trial. The Petitioner filed a Motion in Limine, challenging the admissibility of this piece of evidence. The State concedes in their Answer Brief that the County Court has jurisdiction to address the procedural aspects of the evidence code. Respondent's Brief at 9. The test results are admissible into evidence only upon compliance with the statutory provisions and the administrative rules enacted by its authority. State v. Bender, 382 So.2d 697, 699 (Fla. 1980). Here the County Court addressed the issue of whether a predicate for introduction of this evidence could be established, to-wit: whether the statutory provisions

were complied with. This is a matter which falls within the trial court's jurisdiction. Accordingly, the first certified question should be answered "yes" in the first part and "no" in the second.

ISSUE II

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

The Petitioner relies on the argument as presented in the Initial Brief. The State raised one additional issue in the Answer Brief dealing with the applicability of the new HRS rules (effective August, 1991) to the instant proceedings, which needs to be addressed.

The State argues that the new HRS rules (effective in August, 1991) are fully applicable to evidence secured prior to their enactment. Respondent's Brief at 22. The State cites as its authority <u>Drury v. Harding</u>, 443 So.2d 360 (Fla. 1st DCA 1983); <u>affirmed on other grounds</u>, 461 So.2d 104 (Fla. 1984); <u>State v. Fardelman</u>, 453 So.2d 1183 (Fla. 5th DCA 1984). The State neglected to cite to the Court this Court's decision in <u>Drury</u> "quash[ed] that portion of the District Court opinion relating to the retrospective application of HRS rules ...". 461 So.2d 104, 108. This Court in <u>Drury</u> allowed the use of HRS rules enacted after the defendant's arrest due to the unique factual circumstances before the Court. In 1982, the legislature consolidated the rule making authority for chemical analysis of blood from joint responsibility of the Department of Highway Safety and Motor Vehicles (hereinafter DHSMV) and HRS to the sole responsibility of HRS. The new law became effective July 1, 1982, with HRS adopting the old DHSMV rules as HRS rules on December 16, 1982. The Supreme Court held "when a statute

is repealed and then substantially reenacted....its operation is deemed continuous and uninterrupted." Id. at 108. Under the unique facts of Drury, HRS rules do have retrospective application for the "new" rule is merely readopting a rule which the DHSMV had previously validly enacted. In the instant case the August, 1991 rules are not a reenactment of some old, valid rule. The 1991 HRS rules are an enactment of rules which are similar to a procedure which was previously used by HRS, but was never lawfully enacted as an HRS rule. The facts before the Court are far different than those in Drury.

The second case the State cited as its authority for the retrospective application of the August, 1991 rules was Fardelman. Fardelman came before the 5th District Court between the time the 1st District issued the initial Drury opinion and the time this Court quashed the 1st District's opinion on the retrospective application of HRS rules. The 5th District based their decision on the 1st District Drury opinion, but also certified the question to this Court. Fardelman at 1183. By the time Fardelman made it before this Court, the Drury opinion had already been delivered. The District Court in Fardelman, like the District Court in Drury, reached the correct result, but for the wrong reason. This Court denied the petition for a review of Fardelman. 462 So.2d 1106 (Fla. 1985). However, the District Court's opinion in Fardelman is on longer controlling based upon the subsequent opinion of this Court in Drury. Thus the State's reliance on the District Court cases of Drury and Fardelman is misplaced. The August, 1991 HRS

rules were enacted after the Petitioner's arrest and are totally inapplicable to this case.

For the above stated reasons and the reasons stated in the Initial Brief of the Petitioner, this Court could 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?

The Petitioner relies upon the argument and authority presented in the Initial Brief.

CONCLUSION

Based on the above and the Initial Brief, arguments in authority, 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".

Respectively submitted,

KANETSKY, MOORE & DeBOER, P.A.

By: Robert N. Harrison

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 Petitioner

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, and PEGGY A. QUINCE, Assistant Attorney General, Westward Center, Suite 700 2002 North Lois Avenue, Tampa, Florida 33607-2366; on this 26th day of March, 1993.

KANETSKY, MOORE & DeBOER, P.A.

By: Robert N. Harrison

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