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IN THE SUPREME COURT OF FLORIDA

CASE NO. 81,884

FILED 10/5
SID J. WHITE
SEP 13 1993
CLERK, SUPREME COURT
By _____ Chief Deputy Clerk

JAMES BLORE,

PETITIONER,

vs.

THE HON. EUGENE J. FIERRO, CIRCUIT COURT JUDGE AND CIRCUIT COURT, APPELLATE DIVISION, ELEVENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR DADE COUNTY,

RESPONDENTS.

ON PETITION FOR DISCRETIONARY REVIEW

BRIEF OF RESPONDENTS ON THE MERITS

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INTRODUCTION

The Petitioner, **JAMES BLORE**, was the Defendant in the trial court, the Appellee before the Appellate Division of the Circuit Court of the Eleventh Judicial Circuit, and the Petitioner before the Third District Court of Appeal. The Respondent, **JUDGE EUGENE J. FIERRO**, was the Judge acting for the Appellate Division of the Circuit Court for the Eleventh Judicial Circuit, in and for Dade County. **THE STATE OF FLORIDA**, was the Prosecution in the trial court, the Appellant before the Appellate Division of the Circuit Court of the Eleventh Judicial Circuit, and the Respondent before the Third District Court of Appeal. The parties are referred to in this brief as they stand before this Court. References to the Record transmitted to this Court by the Clerk of the Third District Court of Appeal on July 30, 1993, are designated "R.".

STATEMENT OF THE CASE AND FACTS

On April 21, 1991, the petitioner was arrested and charged with operating a vessel under the influence of an alcoholic beverage pursuant to section 327.35(1)(b) Fla. Stat. (1989). This cause was before the County Court of the Eleventh Judicial Circuit of Florida, in and for Dade County (R.196-197).

On August 14, 1991, the Honorable Nancy Pollack, who was covering calendar for the Honorable Marc Schumacher, heard a pre-trial motion regarding the admissibility of the Petitioner's breath test results. The State proffered the testimony of Officer Maureen Murphy, a police officer who was certified to operate the Intoxilizer 5000R (R.226-251). Judge Pollack held that despite the State's failure in testing the breathalyzer at the .05% concentration level, the State substantially complied with the applicable HRS rules and the Petitioner's breathalyzer results would be admitted (R.252).

On November 4, 1991, Judge Schumacher, without further testimony by witnesses or argument of counsel, suppressed Petitioner's breath test results, overruling Judge Pollack's August 14, 1991 order (R.209-215). The order was signed December 9, 1991 and the State timely filed its appeal (R.202,205). Thereafter, the State served its initial appellate brief on March 3, 1992 (R.254-308).

On April 27, 1992, the Petitioner filed a motion to dismiss the appeal arguing that pursuant to 9.140(c)(1)(B) Fla. R. App. P., the State was prohibited from appealing from an interlocutory order entered by the trial court excluding the results of a DUI breath test on the basis that the administration of the test did not comport with the mandatory, applicable HRS regulations. The Petitioner further argued that the order of December 9, 1991, signed by Judge Schumacher did not involve a confession, admission, or evidence obtained by search and seizure, and therefore appeal was not authorized by this rule. However, the Petitioner noted that the State could seek review of the order by certiorari (R.309-312).

The State responded that direct appeal was authorized by 9.140(c)(1)(B) Fla. R. App. P., because the Petitioner's breath results was evidence obtained by a search. Alternatively, if the State was precluded from a direct appeal, the proper remedy, pursuant to 9.040(c) Fla. R. App. P. would be a petition for writ of common law certiorari (R.313-317).

On May 27, 1992, the Honorable Eugene J. Fierro, Circuit Court Judge acting for the Appellate Division, held that pursuant to State vs. Gemignani, 545 So. 2d 949 (Fla. 2d DCA 1989) and State vs. Townsend, 479 So. 2d 306 (Fla. 2d DCA 1985), Rule 9.140(c)(1)(B) does not permit the state to appeal the suppression of the results of the DUI breath test. The court went on to hold that it would treat the state's initial brief on appeal as a Petition for Certiorari (R.317-318).

On June 5, 1992, the state filed a motion for rehearing arguing that two United States Supreme Court cases, Skinner vs. Railway Labor Executives' Association, 489 U.S. 602 (1989) and Schmerber vs. California, 384 U.S. 757 (1966) held that subjecting a person to a breathalyzer test should be deemed a Fourth Amendment search. Thus, the Petitioner's breathalyzer test result was a search and its suppression was appealable by the State pursuant to 9.140(c)(1)(B) Fla. R. App. P. (R.319-323).

On June 29, 1992, Judge Fierro granted the State's motion for rehearing and the case would be treated as an appeal pursuant to 9.140(c)(1) (R.332-333). Thereafter, the Petitioner sought a Writ of Prohibition in the Third District Court of Appeal to prevent the Circuit Court Appellate Division from acting in excess of their jurisdiction. The Third District denied the Petition, holding that the Petitioner's suppressed breath test results were evidence obtained by a search and that the Circuit Court, Appellate Division, has jurisdiction to entertain a state appeal pursuant to Rule 9.140 (c)(1)(B). The Court disagreed with the Second District's holdings in State vs. Gemignani, 545 so. 2d 929 (Fla. 2d DCA 1989) and State vs. Townsend, 479 so. 2d 306 (Fla. 2d DCA 1985), that a breath test was not "evidence obtained by search and seizure" and certified conflict (R.342-344). The Petitioner then filed a notice to invoke the discretionary jurisdiction of this Court. Jurisdictional briefing was by-passed in accordance with rules 9.030(a)(2)(A)(vi) and 9.120(d) Fla. R. App. P. and the State now presents this brief on the merits.

QUESTION PRESENTED

WHETHER A PRE-TRIAL ORDER SUPPRESSING THE PETITIONERS BREATHALYZER RESULTS IS AN INTERLOCUTORY ORDER APPEALABLE BY THE STATE UNDER FLORIDA RULE OF APPELLATE PROCEDURE 9.140(c)(1)(B). (RESTATED).

SUMMARY OF THE ARGUMENT

The State has a right to appeal an interlocutory order suppressing breath test results pursuant to rule 9.140(c)(1)(B) Fla. R. App. P. That rule permits the State to appeal an order which suppresses before trial confessions, admissions, or evidence obtained by search and seizure. The order the State sought to appeal clearly fits the plain and unambiguous language of the above rule. Further, the Supreme Court has held that a breath test is considered evidence obtained by a search and accordingly, the circuit court has jurisdiction to entertain a State appeal pursuant to Rule 9.140(c)(1)(B).

The State also may appeal the County Court order pursuant to Art. V, §5(b) (circuit court's appellate jurisdiction exists "when provided by general law") and section 924.071, Fla.Stat.(1989), (permits appeals from pretrial orders suppressing evidence "however obtained"). Because the suppressed breath test was evidence "however obtained", the State may directly appeal from an order of the County Court suppressing evidence of intoxilizer results.

ARGUMENT

A PRE-TRIAL ORDER SUPPRESSING THE PETITIONERS BREATHALYZER RESULTS IS AN INTERLOCUTORY ORDER APPEALABLE BY THE STATE UNDER FLORIDA RULE OF APPELLATE PROCEDURE 9.140(c)(1)(B). (RESTATED).

The Petitioner contends that where a trial court, prior to trial, suppresses the results of a breath test, the State is authorized to appeal the interlocutory order only when the interlocutory order has suppressed evidence that was unconstitutionally obtained by search and seizure. The State submits that the Petitioner's interpretation of Rule 9.140(c)(1)(B) is a narrow reading, which is in opposition to the plain and ordinary language of the Rule, as well as the caselaw on this subject.

Rule 9.140(c)(1)(B) Fla. R. App. P. authorizes the State to appeal an order:

> Suppressing before trial confessions, admissions, or evidence obtained by search and seizure.

The suppression prior to trial of the Petitioner's breathalyzer result, regardless of the reason, is appealable by the State. The Petitioner is erroneously attempting to narrow the broadly construed State right to file interlocutory appeals pursuant to rule 9.140(c)(1)(B).

The United States Supreme Court held in Skinner vs. Railway Labor Executives' Association, 489 U.S. 602 (1989), that

> we have long recognized that a compelled intrusion into the body for blood to be tested for alcohol content and the ensuing chemical analysis constitute searches. See Schmerber vs. California, 384 U.S. 757 (1966). Similarly, subjecting a person to a breathalyzer test, which generally requires the production of aveolar or "deep lung" breath for chemical analysis, see, e.g., California vs. Trombetta, 467 U.S. 479, 481 (1984) implicates similar concerns about bodily integrity and , like the blood-alcohol test we considered in Schmerber, should also be deemed a search.

489 U.S. at 616-617. See also, Burnett vs. Anchorage, 806 F.2d 1447 (9th Cir. 1986).

Thus, the Courts holdings in Skinner and Schmerber conclude that the breathalyzer test of the Petitioner in this case was a search, implicating the Fourth Amendment. Further, the definition of the word "obtained" is: to get hold of by effort; to set possession of; to produce; to acquire in any way. Blacks Law Dictionary, Abridged Fifth Edition, 1985. In its simplest form, the breath test results were obtained prior to trial, deemed to be a product of a search, pursuant to Skinner, and therefore the State can appeal from its suppression.

This Court has held that one of the most fundamental tenets of statutory construction requires that we give statutory language its plain and ordinary meaning. See Green vs. State,

604 So. 2d 471 (Fla. 1992). This concept should be equally applicable to the Rules of Court. The language this Court wrote regarding rule 9.140(c)(1)(B) is so plain and ordinary, that any other interpretation would be erroneous. Sub judice, the State clearly has a right to an interlocutory appeal.

The Petitioner's interpretation of rule 9.140(c)(1)(B) is an attempt to force the State to use the certiorari standard of review, i.e., departure from the essential requirements of the law, rather than the less stringent standard of reversible error. The Petitioner's claim centers around the concept that in order for the State to appeal an interlocutory order which was suppressed, the evidence must have been obtained unconstitutionally. Interestingly, the rule is silent as to such language. The rule only provides for a State appeal when, prior to trial, confessions, admissions or evidence obtained by search and seizure is suppressed.

Moreover, the petitioner is attempting to carve out a very narrow interpretation of Rule 9.140(c)(1)(B). In State vs. Brea, 530 So.2d 924 (Fla. 1988) the suppression of admissions by a coconspirator was appealable under Rule 9.140(c)(1)(B). There was no mention of unconstitutionally obtained evidence which was suppressed. In State vs. Palmore, 495 So. 2d 1170 (Fla. 1986), the State had a statutory right to appeal a pretrial order barring it from entering into evidence during its case in chief a sworn statement signed by the defendant. There was no mention of

an unconstitutionally obtained sworn statement which was suppressed. In State vs. Segura, 378 So. 2d 1240(Fla. 2d DCA 1979) the effect of a granting of a motion in limine was exclusion of testimony respecting cannabis found on boats; the order was thus the equivalent of a pre-trial order granting a motion to suppress, and appealable under rule 9.140(c)(1)(B). See also, State vs. Kleinfeld, 587 So. 2d 592(Fla. 4th DCA 1991) (State has right to appeal nonfinal order of trial court suppressing defendant's admissions); State vs. Lamar, 538 So. 2d 548 (Fla. 3d DCA 1989) (Jurisdiction existed over State's appeal from trial Court's grant of a motion in limine excluding defendant's post-arrest statements that constituted an admission).

In Brea, Palmore, Segura, Kleinfeld and Lamar, the State was authorized to directly appeal interlocutory orders suppressing confessions or admissions made before trial, without any mention of the petitioner's narrow reading of rule 9.140(c)(1)(B). None of those cases hold that the evidence suppressed had to be unconstitutionally obtained in order for the State to have the right to appeal.

Therefore, in order to follow the Petitioner's argument, the Petitioner would have this Court believe that there are different standards within rule 9.140(c)(1)(B). The State may appeal pretrial orders which suppress evidence which consists of confessions or admissions. However, when evidence which was

obtained by search and seizure is suppressed, we must look to see if the evidence was unconstitutionally obtained. Otherwise, the State may not appeal such an order. This cannot be the correct reading of rule 9.140(c)(1)(B). It is inconsistent and doubtful of this Courts intention as the rendering body.

The First District anticipated this Courts liberal interpretation of the States right to an interlocutory appeal, in State vs. McPhadder, 452 So. 2d 1017 (Fla. 1st DCA 1984) reversed on other grounds, 475 So. 2d 1215 (Fla. 1985). The district court held that the State could appeal a nonfinal pretrial order striking statements made by an informant on electronic recordings on the ground that the informant was not available to testify and the statements were hearsay. The district court determined that the evidence which was the subject of the order appealed was obtained by search and seizure and was suppressed before trial.

This Court quashed the First District's holding that it did not agree that the evidence was obtained by search and seizure, but rather the evidence consisted of statements made by an informant on electronic recorded tapes which was suppressed because the informant was unavailable and could not be called to trial. McPhadder vs. State, 475 So. 2d 1215 (Fla. 1985). This Court did not question the reasoning of the First District in McPhadder, but only held that the evidence was not obtained by search and seizure. Nothing was mentioned in reference to the

petitioners "unconstitutionality in the obtaining" claim. Further, this situation is distinguishable from the instant case where an intoxilizer test clearly constitutes a product of search and seizure. Skinner.

State vs. Hancock, 584 So. 2d 221 (Fla. 4th DCA 1991), took an even more expansive view of rule 9.140(c)(1)(B). In Hancock the State sought certiorari review of a Circuit Court appellate order dismissing the State's appeal of a County court order precluding the admission into evidence the results of a field sobriety test administered to the defendant. The Fourth District held that rule 9.140(c)(1)(B) has been broadly construed to give the state direct appellate review of pretrial orders, on constitutional grounds, evidence obtained by law enforcement personal from defendants. State vs. Hancock, 584 So. 2d at 222. This holding is an expansive view of Rule 9.140 (c)(1)(B), which includes evidence which was suppressed on constitutional grounds. The Petitioner is attempting to argue the converse, that only evidence suppressed on constitutional grounds in appealable by the State. That is simply an erroneous interpretation of Hancock.

The Third District below, determined that its holding was in conflict with State vs. Townsend, 479 So. 2d 306 (Fla. 2d DCA 1985) and State vs. Gemignani, 545 So. 2d 929 (Fla. 2d DCA 1989) (R. 344). In Townsend, the court accepted jurisdiction pursuant to rule 9.030(4)(B) to determine a question of great public

importance entered by the county court granting a motion in limine suppressing the results of a breath alcohol test on the grounds that an excessive amount of time elapsed between the arrest and the drawing of the blood sample. The court determined it was without jurisdiction to rule and held:

> [a]lthough the county court has certified a question it deems of such importance, its order granting the motion in limine does not fall within Rule 9.140(c)(1)(B) as one which is "otherwise appealable." An order "otherwise appealable" by the state and, hence, within Rule 9.140(c)(1)(B) must suppress "before trial confessions, admissions or evidence obtained by search and seizure." The standard set forth in that rule is not met in this instance. In the face of section 316.1932, Florida Statutes, the taking of the appellee's blood and the subsequent results were neither "pretrial confessions" or "admissions" shielded by the Fifth Amendment, South Dakota vs. Neville, 459 U.S. 553, 103 S.Ct. 916, 74 L.Ed.2d 748 (1983), nor were they "evidence obtained by search and seizure" requiring our intervention to preserve a Fourth Amendment right. See Schmerber vs. State of California, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966).

State vs. Townsend, 479 so. 2d at 307.

The second district's error is apparent where it cites Schmerber vs. California, 384 U.S. 757 (1966) for the proposition that the taking of a blood sample is not "evidence obtained by search and seizure." The Second District reached this conclusion despite the United States Supreme Court's unambiguous statement that compulsory administration of a blood test "plainly involves the broadly conceived reach of a search and seizure under the

Fourth Amendment." Schmerber, 384 U.S. 768. In Skinner vs. Railway Labor Executives' Association, 489 U.S. 602, 616-617 (1989) the Court found this rational was equally applicable to breath test results.

The Petitioner erroneously seeks to narrow the broadly construed state right to file interlocutory appeals pursuant to rule 9.140(c)(1)(B). The State properly exercised its right to appeal an order that suppressed before trial breath test results, which are considered to be results of a search and seizure. This Court should reject the Petitioner's position.

In the alternative, the State has a right to appeal pursuant to Article V, §5(b), Fla.Const. The circuit court's appellate jurisdiction exists when provided by general law. In State vs. Fry, 18 Fla. L. Weekly D1586 (Fla. 2d DCA July 9, 1993) the State asked the second district to review the circuit court's order affirming the county court's order suppressing the results of intoxilizer tests. The State contended that the circuit court erred in applying the certiorari standard of review, rather than the less stringent standard of reversible error.

The court in Fry determined that Article V, §4(b)(1) provides that the district courts of appeal may review interlocutory orders from trial courts "to the extent provided by the Supreme Court." In contrast, the circuit courts' appellate jurisdiction exists when provided by general law." See State vs.

Alvarez, 600 So. 2d 49 (Fla. 3d DCA 1992)(Cope, J. concurring). Therefore, because Fry was an appeal from county to circuit court, general law applies.

Section 924.071(1), Fla.Stat.(1989), permits appeals from pretrial orders suppressing evidence "however obtained" and therefore permits the State to appeal from an interlocutory order of the county court suppressing evidence of intoxilizer results.[1] Fry. Therefore, the State would be able to directly appeal the order of the county court.

The Second District further held that its prior decisions of Townsend and Gemignani were distinguishable with Fry. Both Townsend and Gemignani involved the jurisdiction of the district court to review county court orders certifying matters of great public importance. Rule 9.030(4)(B) sets forth the jurisdiction of the district court of appeal to review nonfinal orders of the county court and thus falls within the appellate review to the extent provided by the rules adopted by the Supreme Court, Art. V, §4(b)(1), Fla. Const. Rule 9.140(c)(1)(B) permits appeals from order suppressing evidence "obtained by search and seizure". In contrast, Fry is an appeal from the County to Circuit Court and pursuant to Art. V §5(b), Fla. Const., appellate jurisdiction

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[1] While sections 924.07 and 924.071 are invalid as applied to interlocutory appeals from the Circuit Court to the District Court of Appeal, R.J.B. vs. State, 408 So. 2d 1048(Fla. 1982), the jurisdiction of the Circuit Court to hear appeals from the County Court, by contrast, is prescribed by general law and has been implemented by sections 924.07 and 924.071, Florida Statutes.

exists when provided by general law. Section 924.071(1), Fla.Stat.(1991), permits appeals form pretrial orders suppressing evidence "however obtained". The Second District held that "[w]e conclude that the phrase 'however obtained', unlike the phrase, 'obtained by search and seizure' permits a direct appeal from an order of the county court suppressing evidence of intoxilizer results."

The State submits that the Second District's rational allows the State to directly appeal the suppression of intoxilizer results from a DUI arrest in county court appeals to the circuit court. However, when a more serious crime, such as DUI manslaughter occurs, where the intoxilizer results are suppressed, the State's only remedy for an appeal, pursuant to Art.V, §4(b), Fla. Const. and Rule 9.140(c)(1)(B), coupled with their holding in Townsend, would be a petition for writ of certiorari. This inconsistent result of placing a less stringent standard of review for misdemeanor cases and a stricter standard of review for felony cases is imprudent. In order to have uniformity throughout the courts of this state, this Court should quash the second district cases of Townsend and Gemignani, affirm the Third District Courts' opinion and allow the State to appeal a pretrial interlocutory order suppressing a breath test result not only from county court appeals to the circuit court, but also from circuit court to the district courts of appeal.

CONCLUSION

Based on the foregoing facts, authorities and arguments, the State respectfully requests this Court to affirm the decision of the Third District Court of Appeal and quash the decisions of State vs. Townsend, 479 So. 2d 306(Fla. 2d DCA 1985) and State vs. Gemignani, 545 So. 2d 929 (Fla. 2d DCA 1989).

RESPECTFULLY SUBMITTED

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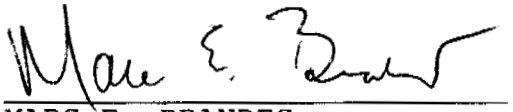

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Respondent was furnished by U.S. mail to Julie Levitt, Special Assistant Public Defender, 1320 NW 14th Street, Miami, Florida, 33125 on this 10th day of September, 1993.

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