IN THE SUPREME COURT OF FLORIDA

PATRICIA RAFTERY and DIANA BURNS,

PETITIONERS,

v.

STATE OF FLORIDA,

RESPONDENT.

CASE NO: 81,998

****

ON DISCRETIONARY REVIEW FROM THE
FOURTH DISTRICT COURT OF APPEAL OF FLORIDA
CERTIFYING QUESTIONS OF GREAT PUBLIC IMPORTANCE

****

AMENDED REPLY BRIEF ON THE MERITS OF PATRICIA RAFTERY AND DIANA BURNS

****

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PRELIMINARY STATEMENT

The following symbols, abbreviations and references will be utilized throughout this Reply Brief on the Merits of Petitioners, PATRICIA RAFTERY and DIANA BURNS:

The term "Petitioners" or "Defendant" shall refer to the Defendants in the County Court below, PATRICIA RAFTERY and DIANA BURNS.

The term "Respondent" shall refer to the prosecution in the County Court below, the State of Florida.

Citations to the pleadings filed at the trial court level contained with the Record of Appeal logged in the District Court of Appeals, Fourth District, together with transcripts of hearings conducted below, the decision issued by the Fourth District and the Order on Motion for Certification, contained within pages 1-556 of the Appendix on the Merits shall be designated by "A" followed by the appropriate page number (A). The "Florida Administrative Code" shall be referenced as "F.A.C.".

All emphasis in this Petitioner's Brief on the Merits have been supplied by the undersigned counsel unless otherwise specified.

POINTS OF APPEAL

POINT I
(QUESTIONS CERTIFIED SUBJUDICE TO THE 4DCA)

THE FAILURE OF HRS TO APPROVE ITS STANDARDS OF GENERAL APPLICABILITY AS TO DETERMINATION OF TEST INSTRUMENT ACCURACY PURSUANT TO RULEMAKING REQUIREMENTS OF CHAPTER 120 FLORIDA STATUTES COMPELS A FINDING THAT SUCH STANDARDS ARE NOT "APPROVED" AND "UNLAWFUL".

THE FAILURE OF HRS TO APPROVE ITS STANDARDS OF GENERAL APPLICABILITY AS TO DETERMINATION OF INSTRUMENT ACCURACY THROUGH ADOPTION "AFTER PUBLIC HEARING" AS REQUIRED BY SECTION 316.1932(1)(f)(1) FLORIDA STATUTES COMPELS A FINDING THAT SUCH STANDARDS ARE NOT "APPROVED" AND "UNLAWFUL".

THE FAILURE OF HRS TO EMPLOY "APPROVED" MAINTENANCE PROCEDURES AND STANDARDS FOR TEST INSTRUMENTS RENDERED THE TEST RESULTS OBTAINED INVALID.

POINT II
NEVADOMSKI CERTIFIED QUESTION I

THE TRIAL COURT PROPERLY HELD THAT RULES 10D-42.023 AND 10D-42.024(1)(c) OF THE FLORIDA ADMINISTRATIVE CODE, IN EFFECT PRIOR TO AUGUST 1, 1991 ARE VOID FOR VAGUENESS, AND THAT SUCH DOES PRECLUDE THE STATE'S USE OF THE BREATH TEST RESULTS OBTAINED THEREUNDER IN A CRIMINAL TRIAL.

POINT III
(RESPONDENTS POINT III RESTATED)

THE TEST RESULTS SHOULD NOT BE INTRODUCED INTO EVIDENCE THROUGH A TRADITIONAL EVIDENTIARY PREDICATE.

POINT I

(QUESTIONS CERTIFIED SUBJUDICE TO THE 4DCA)

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THE FAILURE OF HRS TO EMPLOY "APPROVED" MAINTENANCE PROCEDURES AND STANDARDS FOR TEST INSTRUMENTS RENDERED THE TEST RESULTS OBTAINED INVALID.

Respondent fails to consider that this Honorable Court has discretion to resolve the above issues concerning HRS failure to "Approve" its standards utilized in determination of instrument accuracy should this Court accept jurisdiction over the case. As announced by this Honorable Court in Lawson v. State, 231 So2d 205 (Fla 1970) at page 207:

> Where a question is certified to this Court by a District Court of Appeal as one of great public interest, our scope of review is extended to the entire decision of the District Court, and not just the question certified. Pan American Bank of Miami v. Alliegro, 149 So2d 45 (Fla 1963); Boulevard National Bank of Miami v. Air Metal Industries, Inc., 176 So2d 94 (Fla 1965).

We respectfully note that although the issues initially raised and certified by the County Court to the Court of Appeals in Petitioners Motion to Suppress Breath Test Results (A 226-231) and the Order of the Honorable Zebedee Wright granting Motion to Suppress (A 281-292) were issues of "Approval" within the meaning of Section 316.1932(1)(f)(1) and (1)(b)(2) Florida Statutes, the "vagueness" of HRS Rules 10D-42.023 and 10D-42.024(1)(c) F.A.C. (1990) was ruled upon (A 291). The Trial Court did address the

formally promulgated HRS Rules at Chapter 10D-42 F.A.C. (1990) in effect at the time of the breathtests administered herein prior to new Rule promulgation (effective August 1, 1991) as follows:

> This Court finds Rules 10D-42.023 and 10D-42.024(1)(c) Florida Administrative Code which requires yearly and monthly "checks" for accuracy to be so indefinite as to not establish any standard for determination of instrument accuracy. Such leaves the respective maintenance technicians throughout the State with "broad discretion to employ any standard" for determination of instrument accuracy. State v. Cummings, 365 So2d 153, 156 (Fla 1978). Please note: State v. Flavin, Broward County Case No. 88-5236MM10A (decided January 23, 1989); State v. Catron, 16 FLW C78 (decided April 15, 1991).

Moreover, contrary to assertion of the Respondent at page 9 of its Brief, these issues have not "essentially been answered" in State v. Rochelle, 609 So2d 613 (Fla 4DCA 1992) or State v. Berger, 605 So2d 488 (Fla 2DCA 1992).

Moreover, the Berger Court supra, relied upon by this Court in Veilleux v. State, 18 FLW S636 (Fla December 16, 1993), misplaced its reliance upon the initial opinion in State v. Rochelle, 17 FLW D1756 (Fla 4DCA July 22, 1992) where on a less complete record the Court of Appeals for the Fourth District erroneously opined the monthly preventative maintenance HRS Form 1514 to be utilized in annual inspection performed pursuant to Rule 10D-42.023 F.A.C. (1990) (at 17FLW D1756). Please see: Petitioners Initial Brief, pages 32-36; Petitioners Motion for Clarification of Order Granting Motion for Certification (A 361-367).

POINT II

NEVADOMSKI
CERTIFIED QUESTION I

RULES 10D-42.023 AND 10D-42.024(1)(c) OF THE FLORIDA ADMINISTRATIVE CODE, IN EFFECT PRIOR TO AUGUST 1, 1991 ARE VOID FOR VAGUENESS. SUCH DOES PRECLUDE THE STATE'S USE OF THE BREATH TEST RESULTS OBTAINED THEREUNDER IN A CRIMINAL TRIAL.

In Shannon v. State, 800 SW2d 896 (Texas App. 1990), relied upon by Respondent at page 22 of its Brief, the Court of Appeals announced that guidepost applicable herein in review of Suppression Motions:

> If the decision of the Trial Court is correct on any theory of law which finds support in the evidence, then the mere fact that the Court may have given the wrong reason for its decision will not require a reversal.

Petitioners submit that Rule 10D-42.023 and .024(1)(c) F.A.C. (1990) were "vague" within the meaning of Section 120.52(8)(d) Florida Statutes as constituting "an invalid exercise of delegated legislative authority". Petitioners respectfully submit that the HRS Rules in effect at time Petitioners respective breathtests "failed to establish adequate standards for agency decisions" (A 510-512). The "Constitutional vagueness" arguments presented by Respondent with citation of State v. Rawlins, FLW D1893 (Fla 5DCA August 27, 1993); Southeast Fisheries v. Department of Natural Resources, 453 So2d 1351 (Fla 1984); State v. Rochelle, 609 So2d 613 (Fla 4DCA 1992) and State v. Berger, 605 So2d 490 (Fla 2DCA 1992) which relied upon the Initial Rochelle opinion at 17 FLW D1756 (Fla 4DCA July 22, 1992) offer no guidance as to whether Rules 10D-42.023 and .024(1)(c) F.A.C. (1990) constituted an "invalid exercise of delegated legislative authority" within the meaning of Section 120.52(8)(d) Florida Statutes.

HRS Form 1855 (effective August 1,1991) was formally promulgated subsequent to Petitioners breathtests and replaced HRS 1514. It provided for Preventative Monthly Maintenance the following standards that had not previously existed by formal Rule:

> "All results shall be recorded to the third digit. Acceptable results shall be +/- 10% at 0.05% ethanol (acceptable range is 0.045% to 0.055%), +/- 5% at 0.100% ethanol (acceptable range 0.095% to 0.105%) and +/- 5% at 0.200% ethanol (acceptable range is .190% to .210%).

HRS Form 1855, Aug. 91 set forth the following additional methods to be followed that previously did not exist but were instead left to the discretion of individual maintenance officers as follows:

* 1. MOUTH ALCOHOL TEST-Wash your mouth with stock alcohol solution. When the instrument requests a breath sample blow a breath sample mouth alcohol into the instrument. The instrument must indicate the presence of mouth alcohol.

** 2. ETHANOL FREE TEST-When the instrument requests a breath sample blow an alcohol free breath sample into the instrument. The reading shall indicate no more than 0.010 percent weight per volume.

*** 3. ETHANOL 0.100% + ACETONE TEST-To the 0.100% ethanol solution used for the ETHANOL 0.100% test add 3ml of stock acetone solution. Acceptable results are as follows:

A. INTOXIMETER-the instrument indicates "INTERFERING SUBSTANCES". Record as S for Satisfactory or U for Unsatisfactory.

B. INTOXILYZER-the reading shall vary no more than +/- 0.005 of the arithmetic average of the three readings obtained during the ETHANOL 0.100% test just performed as well as indicate "INTERFERENT SUBTRACTED". Record the actual numeric result.

HRS Form 1856, Aug. 91, the "Inspectors Annual Data Sheet" formally promulgated effective August 1, 1991, further set forth with specificity the standards for acceptable accuracy deviation, number of simulator tests, ethanol simulator concentration values,

and methods of administering mouth alcohol tests, ethanol free tests, and ethanol/acetone tests that were previously left unpromulgated as formal Rules or left in the instance of mouth alcohol tests, ethanol free tests and ethanol/acetone tests to the discretion of individual inspectors performing Annual Inspections.

Please compare HRS Form 1855, Aug. 91, with HRS Form 1514 (A 393,398,265,165). Please compare HRS Form 1856, Aug. 91 with HRS Form 713 and Unpromulgated "Inspectors Annual Data Sheet" (A 263-264).

Petitioners would further note that the legislature has since administration of breath tests to Petitioners transferred Rulemaking authority from HRS to the Department of Law Enforcement with enactment of the Health and Rehabilitative Services Reorganization Act (Chapter 92-58 Laws of Florida). With that new delegation of Rulemaking Authority, FDLE has promulgated its own new Rules implementing the Implied Consent Law which became effective October 31, 1993.

We respectfully submit that notwithstanding the aforementioned redelegation of Rulemaking Authority from HRS to FDLE and the eventual compliance of HRS on August 1, 1991 with the directives of Chapter 120 Florida Statutes and Section 316.1932 Florida Statutes, HRS omissions in Rulemaking as to Petitioners should not be excused. The explanation offered by the former Scientific Director of Implied Consent to Instructor Lower that "he (Dr. Rarick) didn't want to be held to standards if he made a mistake" should not excuse the failure of HRS to publish and promulgate after public hearings and Joint House Administrative Procedures Committee

oversight the HRS standards and procedures utilized in determination of instrument accuracy (A 510-512).

Moreover, the pre-August 1991 unpromulgated standards of acceptable accuracy deviation, simulator concentration values, and number of simulator tests administered in monthly maintenance and Annual Inspections, as the methods individually utilized by individual maintenance officers for mouth alcohol testing, ethanol free testing, and acetone testing cannot be seen to "concern" only Law Enforcement or HRS. The method and standards utilized in determination of breath test instrument accuracy incident to DUI prosecutions are clearly "important to the public" or do affect the "interest" of "persons" within the meaning of Section 120.52(16)(a) Florida Statutes. The Respondents argument at page 23 of its Brief that such are "internal management memoranda" accordingly must fail.

Moreover, Respondents plea for "judicial deference" at pages 24-29 of its Brief should not shield HRS from compliance with the legislative mandate to implement the Implied Consent Law through Rulemaking in accordance with Chapter 120 Florida Statutes. Nor should the pre-August 1991 failures of HRS to adopt its standards in accordance with Section 316.1932(1)(f)(1) Florida Statutes be sanctioned as "an established administrative interpretation" by HRS of the legislative directive that "such rules and regulations shall be adopted after public hearing".

POINT III

(RESPONDENTS POINT III RESTATED)

THE TEST RESULTS SHOULD NOT BE INTRODUCED INTO EVIDENCE THROUGH A TRADITIONAL EVIDENTIARY PREDICATE.

We would respectfully ask this Most Honorable Court, notwithstanding its most recent decision in Veilleux v. State, 18 FLW S636 (Fla December 16, 1993), to consider the Trial Court Order subjudice on a more complete record that held the "traditional evidentiary predicate" unavailable in absence of "approved" testing. As held by the Honorable Zebedee Wright:

> THE PEOPLE who operate motor vehicles on the streets and highways of the State of Florida have given to their government "implied consent" to submit to "approved" testing for determination of blood alcohol content in exchange for the privilege of operating a motor vehicle within this State (Sections 316.1932(1)(a) and (1)(e) Florida Statutes). In exchange for that consent the people have been assured by their government that testing "methods" and "techniques" chosen by the Department of Health and Rehabilitative Services shall first be subjected to "public hearing" and other legislatively designated "approval" criteria and safeguards intended to assure test result reliability and fairness. (State v. Bender, 382 So2d 697 (Fla 1980)). Because the "methods" and "techniques" utilized in monthly and yearly instrument maintenance for determination of instrument calibration and accuracy have not herein been "approved" as required by the legislature pursuant to Sections 316.1932(1)(b) and (1)(f)(1) Florida Statutes, the test administered herein must be considered "unlawful" and the results obtained invalid (A 281-282).

The Respondents' reliance and this Courts citation to Mehl v. State, 18 FLW S487 (Fla September 13, 1993) in its Veilleux decision supra we respectfully submit is misplaced.

The legislature has distinguished the taking of an involuntary blood sample pursuant to Section 316.1933(1) Florida Statutes incident to a felony DUI arrest where death or serious bodily injury has resulted, from the consensual administration of an "approved" breathtest administered pursuant to a citizens "implied

consent" in a misdemeanor arrest. Section 316.1933(1) Florida Statutes does not authorize a coercive draw of a citizens blood in circumstances of a misdemeanor arrest, without death of serious bodily injury.

Petitioners would submit that the government interest in admissibility of a blood alcohol test result taken coercively incident to a felony DUI arrest pursuant to Section 316.1933 Florida Statutes is greater than the State interest in breath test results obtained incident to a misdemeanor DUI arrest.

Moreover, the privacy interests of a citizen who conditionally extends his or her conditional "implied consent" to the intrusion of an "approved" test incident to a misdemeanor arrest should be honored because that consent is given to a "search" within the meaning of the Fourth and Fourteenth Amendments to the United States Constitution. This "search", absent "consent", has not otherwise been authorized by the legislature. As announced in Skinner v. Railway Labor Executives Association, 489 US 602, 103 L Ed 2d 639, 109 S.Ct. 1402 (1989) at pages 616-617:

> "Subjecting a person to a breathalyzer test, which generally requires the production of alveolar or 'deep lung' breath for chemical analysis, see: e.g. California v. Trombetta, 467 US 479, 481, 104 S. Ct. 2528, 2530, 81 L Ed 2d 413 (1984), implicates similar concerns about bodily integrity and, like the blood alcohol test we considered in Schmerber, should also be deemed a search" (e.s.).

Moreover, the Mehl decision supra addresses the failure of HRS to adopt Rules in a circumstance where HRS did not have unpromulgated standards in existence. As found by this Court in the Mehl case supra, HRS permits were individually issued to applicants upon satisfactory analysis proficiency samples.

Moreover, in the case subjudice unlike Mehl supra, HRS had in existence unpromulgated standards which had the force and effect of law that did constitute "Rules" within the meaning of Section 120.52(16) Florida Statutes. The Trial Court finding of fact that such standards were "Rules" and that such unpromulgated "Rules" did constitute an "invalid exercise of delegated legislative authority" within the meaning of Section 120.52(8)(a) Florida Statutes is supported by substantial competent evidence.

Moreover, as opined by this Court in its Mehl decision supra, "the more proper approach" is to read the provisions of Section 316.1932 and 316.1933 Florida Statutes in "para materia". Clearly, the legislature has required "approval" as prerequisite to "lawful testing" in instances of consensual breath testing administered pursuant to Section 316.1932 Florida Statutes.

Moreover, in Ferguson v. State, 377 So2d 709 (Fla 1979), relied upon Respondent at pages 23 and 28 of its Brief, this Court announced "the basic rule of statutory construction that statutes which relate to the same or to a closely related subject or object are regarded as in para materia and should be construed together and compared with each other...to determine legislative intent". There this Court found the "statutory scheme of Chapter 849" to "evince" the "intent to treat the business or profession of gambling as a felony while treating the casual or occasional act of gambling as a midemeaenor" (at page 711).

As in the Ferguson decision supra, so too herein there is a "statutory scheme" in Sections 316.1932, 316.1933, and 316.1934 Florida Statutes that "evinces" a different treatment of

misdemeanor DUIs and unequivocally requires "approval" of breath test administered incident to misdemeanor prosecutions.

Moreover, in Robertson v. State, 604 So2d 783 (Fla 1992), relied upon by Respondent at page 34 of its Brief in effort to expand a "further exception to the exclusionary rule" of "Implied Consent" this Court did not rule upon a consensual breath test administered pursuant to Section 316.1932 Florida Statutes. Rather, the Robertson case supra addresses the coercive testing of blood pursuant to Section 316.1933 Florida Statutes in circumstances of a felony DUI arrest for DUI/Manslaughter.

Moreover, in light of the foregoing we would respectfully ask this Most Honorable Court's re-examination of its finding that the Court of Appeals decision in State v. Berger, 605 So2d 488 (Fla 2DCA 1992) "is essentially in harmony" with this Court's opinions in Mehl supra and Robertson supra. Petitioners submit that this Court's "adoption" of the Berger decision in Veilleux supra should be re-examined subjudice because the Berger Court supra did not address the existence of unpromulgated rules nor "vagueness" within the meaning of Section 120.52(8)(a) and (d) Florida Statutes. Petitioners further submit that this Court's "adoption" of the Berger decision should be re-examined subjudice because Section 316.1932(1)(b)(2) and (1)(f)(1) Florida Statutes clearly "evince" a legislative intent to delegate Rulemaking authority to HRS (now FDLE) to implement the "Implied Consent Law". Moreover, the legislative intent that penalties be imposed for refusal to "submit to an approved chemical test" of Section 316.1932(1) Florida Statutes should be read in para materia with other provisions of

the "Implied Consent" Law that legislatively "evince" a requirement of "approval" in consensual breath testing.

Moreover, because Section 120.63 Florida Statutes did not "exempt" HRS from compliance with the Rulemaking provisions of Sections 120.54, 120.55, and 120.545 Florida Statutes in exercise of its delegated legislative authority to implement the "Implied Consent" Law, the subject "Rulemaking" omissions of HRS at the time of Petitioners respective tests should not be excused. The alternative "unapproved" traditional evidentiary predicate to introduction of Petitioners test results at Trial should be denied.

CONCLUSION

Section 316.1932(1)(f)(1) and (1)(b)(2) Florida Statutes mandate that breath testing administered pursuant to the Implied Consent Law be "approved" through formal Rules that "have been adopted" pursuant to Chapter 120 Rulemaking procedures "after public hearing". The standards for accuracy deviation, number of simulator tests and ethanol concentration values of simulator solution used in monthly maintenance and annual inspection of test instruments had not been "Adopted" as formal Rules pursuant to Section 120.54, 120.55, and 120.545 Florida Statutes at time of test administration subjudice. Because these standards were "standards of general applicability" that "required compliance" they did constitute "Rules" as defined as Section 120.52(16) Florida Statutes. Because these "standards of general applicability" were not promulgated as "Rules" they were "INVALID RULES" within the meaning of Section 120.52(8)(a) Florida Statutes. Moreover, Rules 10D-42.023 and 10D-42.024(1)(c) Florida Administrative Code (1990) required only general terms "checks" for "accuracy", "reproducibilty", and "cleanliness". These formally adopted rules constitute an "invalid exercise of delegated legislative authority" as defined at Section 120.52(8)(d) Florida Statutes for reason that they were so "vague" as to not set standards from which compliance could be determined. The August 1, 1991 Amendments to Chapter 10D-42 Florida Administrative Code cannot be applied retrospectively. The alternative "unapproved" traditional evidentiary predicate to introduction of Petitioners test results at Trial should be denied.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of the foregoing Reply Brief was furnished this 11th day of February, 1994 to the Clerk of Court, Florida Supreme Court, 500 South Duval Street, Tallahassee, Florida 32399-1925 and a copy furnished to JAMES CARNEY, ESQ., Assistant Attorney General, 111 Georgia Avenue, Suite 204, West Palm Beach, Florida, 33401

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