047

10/26

IN THE SUPREME COURT OF FLORIDA

LAWRENCE B. FOLSOM, ET AL., :

Petitioner, :

vs. : Case No. 82,289

STATE OF FLORIDA, :

Respondent. :

_____ :

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

BRIEF OF PETITIONER

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

D. P. CHANCO
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NUMBER 172571

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ATTORNEYS FOR PETITIONER

TOPICAL INDEX TO BRIEF

TABLE OF CITATIONS

STATEMENT OF THE CASE

This case arose from decisions in county courts in Polk County which involved motions to suppress, and motions in limine, for breath alcohol tests performed on a device known as an Intoxilyzer (R354-358).

The State appealed the county court rulings to the Second District Court of Appeal, which ruled that the motions to suppress and motions in limine should not have been granted (R359).

A notice to invoke discretionary jurisdiction was filed on August 27, 1993.

STATEMENT OF THE FACTS

- Hearing of July 29, 1991, before the County Court -

Dr. Howard Rarick, scientific director of the Implied Consent Program for the Health and Rehabilitative Services Office of Laboratory Services, testified for the defense (R29). Dr. Rarick stated that his office approves instrumentation for use and registration of instruments for blood and alcohol testing (R29). The witness also said that the Department of Health and Rehabilitative Services promulgates rules regarding operation of the testing machines for breath testing (R33).

According to Rarick's testimony, new rules had been proposed based upon decisions which addressed questions regarding maintenance and testing of blood alcohol and breath alcohol machines (R35). The trial defense advocate, Mr. Mel McKinley, noted that inquiry was only being made regarding breath alcohol testing instruments (R30).

Defense witness Rarick said that monthly preventive maintenance by use of a stock solution and simulator to test the instruments is done by a local technician, and annual testing is performed by HRS (R36-37). Rarick also said a simulator is a device which heats the solution and delivers it to the testing instrument. Rarick admitted that the simulators are not certified and approved by HRS (R37).

The stock solution, Rarick stated, is prepared in his laboratory by a chemist, checked, and then sent to agencies for use (R38). The solution is prepared according to a formula, but the

formula is not prescribed by rule (R40). The stock solution is sampled, and the samples tested by a gas chromatograph (R40-41). Controls for the single chromatograph used are traceable to the National Standards' Bureau (R41). Dr. Rarick testified that the protocol utilized to insure that results from chromatograph use are valid, is to follow the manufacturer's recommendations for chromatograph operation (R43). He also said that if a technician had a solution which did not "test out," he would be unaware as to whether the problem was in the stock solution or the test instrument (R44). Rarick testified that the only way a technical could determine if the problem is with the machine or the solution was to follow concepts taught in a 40-hour class. The instructional materials given in that class are not covered by the administrative rules (R48). Section 10D-42 of the Administrative Code outlines that material taught (R100).

According to the testimony, in the new administrative rules, which became effective on July 31, 1991, a new test for the commercial drivers license was added. A new maintenance form was made. That form was placed in evidence as defense exhibit 2 (R61).

Dr. Rarick also testified that when the inspectors do their annual instrument checks, working solutions are used to check the machines (R67-68). Working solutions are made from stock solutions. Distilled water is recommended for the monthly test solutions (R68). That recommendation comes from the 40-hour class. According to Rarick's testimony, the word accuracy, as regards the

annual inspection, was not defined in the then-existent HRS rules (R75).

David Waters was called as a defense witness. He is a corrections officer for the Polk County Sheriff's Office (R124). He is also a breath testing technician for the Sheriff's Department (R125).

According to Water's testimony his training for the breath testing was a 40-hour class on infrared testing (R125). He also stated that he took a 16-hour maintenance course on the Intoxilyzer 5000 (R126). The 40-hour course was taught at a community college (R127). When Waters does monthly maintenance tests on the breath instruments, he follows guidelines which were given to him in the college class by the instructor. He testified that he did not know who prepared those guidelines (R128). When the witness prepares the testing solution, he uses tap water (R132). Waters testified that there are no rules or regulations regarding use of tap water or distilled water (R133). Officer Waters said that he has never had the test solution tested by an independent agency to verify that it was prepared properly (R136). Officer Waters also stated that he does nothing to verify the solution's strength after he prepares it (R136). This witness testified that he opened one machine up to replace a bulb. That instrument was not re-certified by HRS after being opened (R136-137). It was, however, given the standard monthly test. Waters also stated that a recent training session had been held in regard to new forms. It was necessary because some forms had been improperly executed (R148).

Officer Waters testified that if he obtains an incorrect reading when testing an instrument, he does not fill out a 1514 form. He does not fill that form out until he obtains the reading he wants (R162).

Defense witness Mitchell V. Parmer testified that he is a policeman for the Lakeland Police Department and is also the maintenance operator (R169, 172). He said that he has done all the maintenance since the Intoxilyzer 5000 was adopted by Lakeland (R170).

Officer Parmer stated that he was familiar with the HRS Regulations under 10D-42 (R172). He testified that he had not seen written rules regarding accuracy in regard to maintenance of the test instruments (R173). Parmer uses distilled water and class A glass when mixing his solution. He previously used other glassware (R174). According to this witness's testimony, the preventive maintenance form is the only written guide or instruction sent from the Department (R175).

Officer Parmer also said that when Lakeland received the test instrument, they received an operator's log book and an instruction book. Those books were not promulgated rules of the Department of Health and Rehabilitative Services (R225).

Defense exhibits 1, 2, 3, 4, and 5 were placed in evidence (R183-189). State composite exhibit 1 was placed in evidence (R221).

Patrick Demers testified for the defense. He is a forensic chemist (R227). He was accepted as an expert witness (R234).

Demers stated that he had experience in regard to manufacture of standard solutions for testing accuracy of breath testing instruments (R231).

This witness said that solutions made in the field would provide "ball park" solutions for knowing approximately where you are. The value of such solutions has to be assumed until they are proven. The value of such a solution is not certain until it is tested by an independent analysis using an alternate method (R233). According to Demers, the methods he heard described in court would give sort of a ball park figure (R236).

In forensic science, there are screening tests and evidentiary tests. Initially breathalyzer and other breath testing devices were designated as screening devices, to be given evidentiary values by use of another test or testing protocol (R239).

Mr. Demers is familiar with rules 10D-42.023 and .024, relating to annual tests for accuracy and reproducibility (R245). According to him, the terms accuracy and precision are explained as: precision is repeatability; accuracy is ability to hit the bull's eye (R246).

In Mr. Demer's opinion, a solution could be contemporaneously prepared, but it would require that a different testing method to do quality control to assay the solution's known value be used (R248). In a laboratory, the distilled water is analyzed to determine that no interferons are in it (R250). Use of tap water in a standard solution would require making a reagent blank to determine whether it would or wouldn't interfere with the breath

test (R251). Demers opined that the Florida procedure, with the final test standard being mixed by technicians, is not consistent with good scientific practice (R254). The yearly and monthly tests, as described at the hearing, are not good scientific procedure and would not provide scientifically reliable test results (R255). According to the witness' opinion, the Florida laws and rules relating to annual and monthly accuracy checks are not sufficiently specific to provide accurate checks (R256). The then-current methods that the technicians used to prepare samples did not rise to the level of scientific reliability (R258). Demers said that forms 1514 and 1856 can't simply be picked up and read without special knowledge (R259). According to Demers, it is not acceptable to test the solution with the machine, using the machine as a base (R264). Demers' concern was not with the stock solution, but with the way the solutions were mixed at the operator's level (R274). In Mr. Demer's opinion, the Florida laws are not specific enough to come up with a scientifically reliable test (R282).

The defense rested.

The prosecution called Harold Rarick as a state witness. Rarick testified that the difference between the monthly checks made in regard to the testing instruments was that the annual check tested at more levels for linearity (R291). Rarick said that he was not aware of another state that used the same procedures that Florida does (R294). Rarick said he had used tap water many times, but never found alcohol in it (R297).

On cross examination, Rarick testified that the procedure utilized for preparing a working solution from the stock solution was not in the administrative rules (R308-309). The witness stated that promulgated standards existed in the rules which became effective in August 1991, but not prior to that time. Before the effective date of the rules, the standards were agency policy (R312).

The state rested.

SUMMARY OF THE ARGUMENT

These cases arose in county court, went to the district court, and by issuance of certified questions, came before this court.

I, II

The question presented by the defense to a panel of county judges at a hearing held in regard to motions to suppress and motions in limine, was whether or not breathalyzer results were admissible when it was shown that the machines were not checked by scientifically-reliable methods.

Under the process in place at the time these cases arose, the breath-testing machines were checked by the Department of Health and Rehabilitative Services once a year by inspectors, and were given monthly maintenance checks by technicians. Those breathalyzer checks were given scrutiny by the parties at the hearing.

Various evidence was presented at the hearing which included testimony indicating that the annual machine tests were done by use of working solutions, which were prepared from a laboratory-supplied stock solution (R67-68). Those working solutions were prepared in the field. The formula for the solution was not proscribed by rule (R40). However, the stock solution was checked by chromatograph.

The monthly breathalyzer tests were done by technicians who used simulators (which were not certified and approved by HRS (R37)), and working solutions made from stock solutions. Since no rule existed requiring use of the recommended water (distilled water) in preparation of the working solution, technicians

sometimes used tap water in the solutions (R132-133). No independent analysis was undertaken to verify that the working test solution was accurate (R136). Tap water may contain interferons, which might interfere with breath testing devices (R251).

The instrument used, the Intoxilyzer 5000, is not specific for ethyl alcohol, and thousands of other chemicals will give a reading on it. When tap water is used, it isn't known if it contains interfering compounds (R297-298).

Evidence was presented that the rules in existence when the instant cases arose were not sufficiently specific to provide accurate breathalyzer checks (R256).

The ruling of the intermediate court, which reversed the trial court's ruling in regard to the motions to suppress and motions in limine, is questioned by Petitioners.

The Petitioners would assert that the testimony presented at the evidentiary hearing held in this case is clear -- the administrative rules which existed were insufficient to insure reliable standards by which to test the breathalyzers and the procedures used were not reliable. The district court's decision was incorrect and should be reversed.

III

The Petitioners agree that the county court had the authority to rule on these issues.

ARGUMENT

ISSUE I

ARE FLORIDA ADMINISTRATIVE CODE RULES 10D-42.023 AND 10D-42.024 VOID FOR VAGUENESS, AND IF SO, DOES THIS PRECLUDE THE STATE'S USE OF BREATH TESTING RESULTS IN A CRIMINAL TRIAL? [AS CERTIFIED BY THE LOWER COURT]

ISSUE II

DO THE CURRENT METHODS OF HRS' MONTHLY AND YEARLY MAINTENANCE ACCURACY CHECKS COMPLY WITH THE REQUIREMENTS OF §316.1932(1)(F)(1), FLORIDA STATUTES, AND IF NOT, DOES THIS PRECLUDE THE STATE'S USE OF BREATH TESTING RESULTS IN A CRIMINAL TRIAL? [AS CERTIFIED BY THE LOWER COURT]

It is the position of Petitioners that the issue in this case is whether or not a person can be convicted of a criminal offense, having serious consequences, based upon the functioning of a mechanical device, when there is no administrative rule to insure that the machine is a properly operating unit, and the evidence casts doubt on tests of the machine's accuracy.

The evidence presented by live testimony at the hearing for this case clearly showed that there was an absence of sufficient administrative rules to insure accurate testing of the breathalyzer machines, the Intoxilyzers.

The functioning of the machine itself, in many cases, establishes the basis for determination of guilt or innocence of a

human being.[1] Given that situation, the functioning of that machine, Petitioner would assert, should be shown to be valid, and rules should exist to insure the device's accuracy. Even with today's advanced electronic and computer technology, human judges still are used to make decisions. Even though computers have a perfect memory and are incapable of being biased by human emotion, they have not replaced human beings. The main reason is that no machine is infallible.

The Intoxilyzer, it is asserted, has no more inherent perfection than does any such machine, yet it is permitted to make a determination of proof of whether or not an accused defendant is guilty of a serious criminal offense.

Because of this situation, the evidence presented at the hearing in this case is significant.

The breath testing machines are tested by the Department of Health and Rehabilitative Services once a year by inspectors (R36-37). The machines are tested once a month by law enforcement agency technicians (R36-37). The technician uses a working solution of alcohol and water and a simulator. The simulator is used to heat the working solution and puts it into the breathalyzer (R37). The testimony noted that the simulators were not certified and were not approved by Health and Rehabilitative Services (R37).

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[1]The charge against at least one defendant was stated in the alternative: either having an unlawful blood alcohol level, or driving or having control of a vehicle while under the influence of an alcoholic beverage to the extent of being impaired (R328-329).

Should one of the monthly tests show the machine to have been inaccurate, it was not possible to determine when it commenced to malfunction, and it would not be possible to tell how many breathalyzer tests it performed which were not accurate. The agency was supposed to inform the State Attorney, but that suggestion was not in the applicable rules (R304).

The testimony showed that the working solution used to test the breathalyzers was mixed with tap water by at least one of the technicians (R132, 137, 157).[2] No independent test of the working check solution was undertaken to verify the proper preparation of the solution, as it isn't required by the rules (R136, 308-309).

Tap water (which was allowed by the rules), may contain interferons, which might interfere with breathtesting devices (R251). While the only witness to testify on behalf of the state said he never found alcohol in tap water,[3] The importance of this

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[2]There was also testimony that another technician, at a different law enforcement agency used distilled water (which is the recommended water) (R68, 174). The only state witness was critical of the technician who used tap water, but the reality is that the technician was truthful about how he did things, and that he did use tap water.

[3]The testimony in this regard incudes the following:

> ...I've yet to find alcohol in tap water, or interfering compounds.
>
> * * *
>
> Generally, ...tap water doesn't have interference in it, but it <u>can have</u>. So now you don't know when you use tap water whether you're got something else in it (R297-298). (emphasis added)

fact is that the test instrument used, the Intoxilyzer 5000, detects alcohol by an infrared Spectraphotomer, which is classed as a fixed photometer, is not specific for ethyl alcohol, and thousands of other chemicals will give a reading on it (R252-253). It was stated that a reagent blank must be run on tap water to determine if dissolved gasses in it could interfere with the test results (R251). There was no evidence that reagent blanks were run by the technicians. In fact, one technician said that he used the machine to test the working solution, instead of using the solution to test the machine (R153).

Other testimony presented by an expert witness (R234), was that the yearly and monthly breathalyzer tests were not good scientific procedure, and did not provide scientifically reliable test results (R255).

At least one criminal offense -- driving with an unlawful blood alcohol level -- is susceptible to being proven by results of an analysis by the subject machine. Yet the rules regarding testing of those machines were said not to be sufficiently specific to allow inspectors and technicians to make accurate checks of those machines (R256, 282).

The evidence presented at the hearing, Petitioner would submit, clearly showed that there was an absence in the then-applicable administrative rules of a requirement to insure reliability of the breath-testing machines. The intermediate

appellate court, in its ruling, even remarked on the existence of the evidence presented,[4] but ruled in favor of the prosecution.

In Petitioner's view, the question of what type of minimum standard should exist to insure that accurate tests occur is the real question. What type of confidence can the public have in a judicial system which would allow criminal penalties to be imposed upon a defendant based upon the analysis of a machine, when there was no set of regulations to insure that machine's accuracy?

Rule 10D-42.023 requires that during each calendar year the breathalyzer be checked for accuracy and reproducibility and rule 10D-024 only requires a monthly check for accuracy.

The scientific evidence presented below, as noted, educated us to the fact that the rules do not prohibit technicians from using tap water in compounding the working solutions for testing the machines. The testimony of the agency technicians educated us to the fact that at least one technician from a big agency did use tap water in the solution preparation.

Reference to State v. Berger, 605 So. 2d 488 (Fla. 2d DCA 1992), was made by the district court in its opinion. In Berger, the court stated:

> Thus, we conclude ... that the entire administrative scheme sufficiently ensures the reliability of results even though it does not set forth specific standards...

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[4]In a footnote at p. 6 of the slip opinion reference was made to "extensive expert testimony" in Berger v. State, 605 So. 2d 488 (Fla. 2d DCA 1992), and the instant case. The testimony presented in this case was, however, mostly presented by the defense, with only one witness being called by the state.

at 491. The opinion in Berger, in setting forth the facts of the case, noted:

> Justice and seven other HRS inspectors perform the annual inspections... He tries to review all of the monthly inspection forms and manages to review most of them.

at 490. The evidence in this case shows that the monthly forms only indicate valid test results, as the technician who testified for the Polk Sheriff's Department did not write down the test results which showed a problem. That witness simply ran the test until he got the result he wanted and then filled out the form (R161-163). Since the lower court felt that it was significant enough that the HRS inspector reviewed as many of the reports as he could to mention it in their opinion, it should be noted that one technician[5] only submitted reports which were favorable.

The facts of the instant case, in Petitioner's opinion, overwhelmingly indicate that the situation in regard to the tests of the breathalyzers was that the testing protocols were sadly deficient in quality.

The question of application of the implied consent law was addressed by the Third District in State v. Demoya, 380 So. 2d 505 (Fla. 3d DCA 1980):

> Florida having adopted an implied consent law --- that law is to be strictly construed.

at 506. Petitioners would assert that the implied consent provisions, the criminal offense provisions, the approved testing

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[5]Another technician testified. He said he had a problem with a machine, and did not file a report, but may have mentioned the problem to the state attorney and to Mr. Decker (R203-204).

provisions, and the relevant administrative rules are all interrelated.

It must be noted that a defense witness, who had been qualified as an expert "several hundred" times in regard to breath alcohol testing, stated that the procedures used in Florida were not scientifically reliable, and that the tests did not provide scientifically reliable results (R230, 254-255). Does such evidence, plus the fact that the machines used are not specific for ethyl alcohol (R252-253), show that the relevant statutes are being "strictly construed?" Petitioners would say "no."

Given the fact that the overwhelming evidence in this case indicates significant problems with the then-existing testing procedures, it is Petitioner's stance that the intermediate appellate court's ruling was incorrect, and that it should be reversed.

ISSUE III

MAY THE DEFENDANT RAISE THESE ISSUES IN THE CONTEXT OF A CRIMINAL PROSECUTION IN THE COUNTY COURT? [AS CERTIFIED BY THE LOWER COURT]

Petitioners agree with the lower court that these issues were properly raised in the county court.

CONCLUSION

Based upon the aforementioned reasons and authorities, Petitioners pray that the intermediate appellate court's decision reversing the county court's ruling as to these issues be reversed.

APPENDIX

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

STATE OF FLORIDA,

Appellant,

v.

LAWRENCE B. FOLSOM, DOMINGO AGUIRRE, DELBERT BAKER, GARY C. BASS, KENNETH S. BIELEN, BERNETA BOLLARD, CLIFFORD EARL BOYTE, DARYL BRADDY, KIRK DAVID BROWN, DARLING D. BUFFINGTON, ROYCE WENDELL BULLINGTON, THOMAS DAVID BURNS, NOE CARMONA, GERALD W. CHASTEEN, JAMES D. COMBEE, ROBBIE COTTRELL, MARK DEVLIN, MICHAEL DEWITT, HERSHELL DIAL, SANTIAGO CARBAJAL DIAZ, ROBERT V. DINSDALE, MILTON K. DOOLEY, HOWARD ASHTON DRAWDY, JOHN D. DUNNEGAN, WILLIAM GLENN EGGLESTON, THOMAS ENGLERT, EDNA JEAN FORBUS, ERIC GLENN FRANZ, DONALD G. GEHR, TONIA LEE GRAHAM, DAVID GRAY, EUGENE P. GREENWALT, DENNIS ALBERT GUTSCHLAG, EMIL I. HAAS, LARRY HADDEN, CHARLES DAVID HALE, WALTER H. HARKALA, WILLIAM ALEXANDER HENRY, JR., RONALD ADRIAN HERNANDEZ, GERALD LEON HIGGS, SHEILA J. HOLLOWAY, DOUGLAS LEE HOLMES, EDWARD JEROME HOREHLAD, SCOTT C. HOUGHTALING, MALISA ANN HUGHES, PHYLLIS K. JENKINS, REBECCA J. KING, RICKY LYNN KING, ROBERT D. KITCHELL, SHARON KLINS, JUANITA KREPELA, ANTHONY T. LAFRENIERE, ROBERT LEONARD,

Case No. 91-02817

A1

ELEOSIPO LOPEZ, WILLIAM SHANE LYLE, WILLIAM E. McCARROLL, JOHN E. McNALLY, MICHAEL D. MAROSCHAK, CARL TRAVIS MARTIN, JUAN M. MEJIA, ROBERT R. MEYERS, ROBERT JOHN MEYERS, BRIAN J. NEESON, HARVEY L. PATTON, GLEN PETERS, ERIC D. PHARNES, ROBERT M. RAINER, RICHARD RATTON, ROBERT PITTS RYAN, GEORGE T. SAKELLOS, JAMES R. SCOTT, SHARON LEE SMART, ROY LEE SMITH, DANIEL M. SPEIR, CATHERINE M. SWALLOWS, CARL KEVIN TESLOW, CLIFFORD BRACE THOMASSET, COURTNEY E. TOOLE, MERELE TRAVIS, BOBBIE A. VICTORY, WILLIAM J. VOLLMAR, and EVERETT STANTON WALDEN,

Appellees.

STATE OF FLORIDA,

Appellant,

v.

PETER CARACAUS, ARCHIE E. GRIFFIS, WAYNE HOSKINS, EDWIN STIFFLER, and RAFAEL VELEZ,

Appellees.

Case No. 91-03021

STATE OF FLORIDA,

Appellant,

v.

DAVID LEROY MILLER, WILLIAM SANFORD WALLACE, and JAMES EDWARD ANDERSON,

Appellees.

Case No. 91-03420

Opinion filed July 23, 1993.

A2

Appeal from the County Court for Polk County; Harvey A. Kornstein, Administrative Judge of County Court and Anne H. Kaylor, County Judge.

Robert A. Butterworth, Attorney General, Tallahassee, and Stephen A. Baker, Assistant Attorney General, Tampa, for Appellant.

James Marion Moorman, Public Defender, Bartow, and D. P. Chanco, Assistant Public Defender, Bartow, for Appellees.

PARKER, Judge.

The State of Florida challenges orders of the county court of Polk County which granted motions to suppress and in limine excluding alcohol breath test results from evidence in several cases involving the prosecution for driving under the influence. We have consolidated these three appeals which involve ninety defendants. We reverse, concluding that the rules and methods relating to maintaining and testing the equipment used to determine breath alcohol content are not void for vagueness and substantially comply with the statute which governs breath tests. We further conclude that the county court had subject matter jurisdiction over the challenge to these rules.

In June 1991 the county court in Polk County entered an administrative order which consolidated for motion purposes only all cases which had motions challenging the statutes and rules relating to alcohol breath testing. On August 15, 1991, the court entered an order denying the motions but then became aware

of the Fifth District's opinion in State v. Reisner, 584 So. 2d 141 (Fla. 5th DCA), review denied, 591 So. 2d 184 (Fla. 1991) which affirmed a county court's exclusion of alcohol breath test results. The county court then entered supplemental orders which disagreed with Reisner but followed that decision and excluded the evidence because it found that no other district court in Florida had ruled on the issue. The county court also certified the following questions to this court:

> I. ARE FLORIDA ADMINISTRATIVE CODE RULES 10D-42.023[1] and 10D-42.024[2] [AS THEY EXISTED PRIOR TO AUGUST 1, 1991] VOID FOR VAGUENESS, AND IF SO, DOES THIS PRECLUDE THE STATE'S USE OF BREATH TESTING RESULTS IN A CRIMINAL TRIAL?
>
> II. DO THE CURRENT METHODS OF HRS'S MONTHLY AND YEARLY MAINTENANCE ACCURACY CHECKS COMPLY WITH THE REQUIREMENTS OF

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[1] Florida Administrative Code Rule 10D-42.023 provides:

> All chemical breath test instruments used for breath testing under the provisions of Chapters 316, 322 and 327, Florida Statutes, shall be previously checked, approved for proper calibration and performance, and registered by authorized personnel of the Department, by trade name, model number, serial number and location, on forms provided by the Department. All such chemical test instruments registered hereunder shall be checked at least once every calendar year (January 1 through December 31) for accuracy and reproducibility by authorized personnel of the Department.

[2] Prior to August 1, 1991, Florida Administrative Code Rule 10D-42.024(1)(c) provided: "Chemical tests, instruments and devices used in the breath test method shall be inspected at least once each calendar month by a technician to ensure general cleanliness, appearance, and accuracy." That rule now can be found in Florida Administrative Code Rule 10D-42.024(1)(b).

SECTION 316.1932(1)(f)1, FLORIDA STATUTES,[3] AND IF NOT, DOES THIS PRECLUDE THE STATE'S USE OF BREATH TESTING RESULTS IN A CRIMINAL TRIAL?

III. MAY THE DEFENDANT RAISE THESE ISSUES IN THE CONTEXT OF A CRIMINAL PROSECUTION IN THE COUNTY COURT?

We answer the first certified question in the negative. We answer the second and third certified questions in the affirmative.

Since the briefs were filed in these appeals, this court decided the case of State v. Berger, 605 So. 2d 488 (Fla. 2d DCA 1992). Berger, a case very similar to the instant matter, involved six defendants from Sarasota County. The state presented the testimony of an alcohol breath testing inspector who testified regarding the rules and procedures on breath testing. The Berger court disagreed with Reisner and held that the rules regulating alcohol breath testing and the procedures

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[3] Section 316.1932(1)(f)1, Florida Statutes (1989) provides:

> The tests determining the weight of alcohol in the defendant's blood shall be administered . . . substantially in accordance with rules and regulations which shall have been adopted by the Department of Health and Rehabilitative Services. Such rules and regulations shall be adopted after public hearing, shall specify precisely the test or tests which are approved by the Department of Health and Rehabilitative Services for reliability of result and facility of administration, and shall provide an approved method of administration which shall be followed in all such tests given under this section.

The legislature amended this section in 1991 to include tests determining the weight of alcohol in the breath. Ch. 91-255, §2, Laws of Florida.

A5

used sufficiently ensured the reliability of the tests.[4] The Berger court also held that the county court had subject matter jurisdiction over the challenge to the rules. Although the certified questions in Berger are somewhat different than the certified questions in the instant appeals, we conclude that the Berger opinion addressed all of the issues raised in this appeal. We, therefore, reverse the trial court's orders which granted the motions to suppress and in limine and remand for further proceedings consistent with this opinion. We further certify to the supreme court the questions set out earlier in this opinion.[5]

Reversed and remanded.

DANAHY, A.C.J., and SCHOONOVER, J., Concur.

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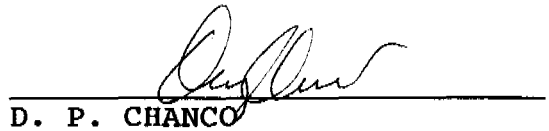
[4] The Fourth District also has held that the rules regulating alcohol breath testing were not void for vagueness in State v. Rochelle, 609 So. 2d 613 (Fla. 4th DCA 1992), dismissed sub nom. Comrey v. State, 617 So. 2d 318 (Fla. 1993).

[5] We are not certifying conflict with Reisner because, although we are reaching a contrary conclusion, the result in Reisner may be explained by the fact that the state failed to present any evidence to support its position. In Berger and the instant cases the state presented extensive expert testimony regarding the rules relating to breath testing, the periodic inspection procedures, and the forms used when testing the equipment.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Steve Baker, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 1ST day of October, 1993.

Respectfully submitted,



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