0-17

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

VS.

Case Number: 82, 631

JAMES E. TAYLOR,

Respondent

RESPONDENTS BRIEF

ROBERT E. JAGGER, PUBLIC DEFENDER
SIXTH JUDICIAL CIRCUIT IN AND FOR
PINELLAS COUNTY, STATE OF FLORIDA

By: Terry M. Staletovich
Assistant Public Defender
Florida Bar Number: 0937983
Airport Business Center, Building 3
14255 - 49th Street North
Clearwater, Florida 34620
(813) 464-6100

TABLE OF CONTENTS

PAGE

TABLE OF CITATIONS

STATEMENT OF THE FACTS

On August 10, 1991, Respondent, James E. Taylor, was observed by Officers Quandt and Peterson of the St. Petersburg Police Department, traveling in a vehicle westbound on 30th Avenue North, St. Petersburg, at a high rate of speed. At that time, the officers began to follow the Respondent. The Respondent turned onto 31st Avenue North and stopped to drop off a passenger, Officer Quandt approached the Respondent and requested his driver's license and vehicle registration. The Respondent complied with the officer's request. Officer Quandt then asked the Respondent to exit the vehicle and the Respondent complied. Officer Quandt noted a strong odor of alcohol, bloodshot eyes, and slurred speech.

After exiting his vehicle, the Respondent inquired of the officer if he would be asked to perform field sobriety tests. The officer responded that he would, wherein, the Respondent stated that he had been told by his attorney not to perform field sobriety tests, and subsequently refused the officer's request to perform field sobriety tests.

Following the Respondent's refusal, Officer Quandt explained the purpose of field sobriety tests to the Respondent and further stated that if the Respondent refused, he would have to make a decision regarding arrest for DUI based upon what he had observed up to that point. The Respondent refused and was arrested for Driving Under the Infiuence. The Respondent was never told that he was required to take field sobriety tests or that his refusal would be used against him in a future criminal proceeding.

STATEMENT OF THE CASE

The Office of the State Attorney elected to proceed under Uniform Traffic Citation CTC91-90320WAASP in lieu of filing an Information. The case was set for Pretrial Conference on October 7, 1991 at which time the Public Defender was appointed.

On January 27, 1992, the Respondent filed a Motion to Suppress any evidence regarding the Respondent's refusal to take field sobriety tests. (App. A) After hearing argument of counsel (App. B) and reviewing the applicable case law, the Trial Court granted the Respondent's motion and further found "that in the absence of knowledge by the Petitioner that he was legally compelled to submit to field sobriety testing, or that his refusal to do so would have adverse consequences, the refusal is irrelevant and lacking of probative value." (App. C)

The State then sought a review of the Trial Court's order. The Sixth Circuit Court, sitting in its Appellate capacity, treated the State's Notice of Appeal as a Petition for Writ of Certiorari. The Circuit Court quashed the Trial Court's order and remanded the case back to the Trial Court. (App. D)

The Respondent then filed a Petition for Writ of Certiorari pursuant to Fla.R.App.P. 9.030(c)(2) with the Second District Court of Appeal. The Second District Court of Appeal held that the Sixth Circuit Court departed from the essential requirements of law and granted the Respondent's Petition for Writ of Certiorari. In quashing the Circuit Court's order, the Second District held that pre-arrest field sobriety

tests are not compulsory. Taylor v. State, 18 FLW D2233 (Fla. 2d DCA 1993). (App. E) Because of the impact of the decision, the Second District Court of Appeals certified the following question as a matter of great public importance.

IS A DUI SUSPECT'S REFUSAL TO SUBMIT TO PRE-ARREST FIELD SOBRIETY TESTS ADMISSIBLE IN EVIDENCE?

SUMMARY OF THE ARGUMENT

The applicable State statute governing tests for alcohol, chemical, or controlled substance impairment while operating or in actual physical control of a motor vehicle does not compel a driver of a motor vehicle to submit to pre-arrest field sobriety tests, nor does is provide that refusal to submit to field sobriety tests is admissible in evidence. The Second District Court of Appeal has correctly determined, after a thorough review of the statute and case law, that pre-arrest field sobriety tests are not compulsory and that an individual's refusal to submit to such tests is not necessarily relevant evidence of consciousness of guilt.

Furthermore, where the Respondent was not told that he was required to submit to field sobriety tests or that his refusal may have adverse consequences in criminal proceedings, the refusal to perform such tests is irrelevant and lacking of probative value.

Also, due process considerations support the suppression of the Respondent's refusal to perform field sobriety tests.

ARGUMENT

The Respondent urges the Court to affirm the decision of the Second District Court in finding that pre-arrest field sobriety tests are not compulsory and that an individual's refusal to submit to such tests may not be relevant evidence of consciousness of guilt. Tavlor v. State, 18 FLW D2233, 2234 (Fla. 2d DCA 1993). Section 316.1932, Florida Statutes (1993) establishes tests for alcohol, chemical, or controlled substance impairment by the operator of a motor vehicle. [The statute requires that] the operator of a motor vehicle in Florida is deemed to have given his consent to submit to a chemical test or physical test for the purpose of determining blood alcohol or chemical content if he is lawfully arrested for a criminal offense committed while such person was driving or in actual physical control of a motor vehicle. The statute declares that such tests will be incidental to a lawful arrest. § 316.1932(1)(a), Fla.Stat. (1993).

The statutory language does not expressly or implicitly require the operator of a motor vehicle to submit to pre-arrest field sobriety tests. Tavlor, 18 FLW at 2234. The State relies on the Sixth Circuit Court holding in State v. Donaldson, No. CRC90-16389CFANO, cert. denied 599 So.2d 663 (Fla. 2d DCA 1992) which held that when a law enforcement officer has a well-founded suspicion of DUI he can require a suspect to submit to a pre-arrest field sobriety test. The Florida DUI statutory language does not support this finding. §§ 316.1932, 1933, 1934, Fla.Stat. (1993). With probable cause of DUI a law enforcement officer may **ask** or request that a suspect perform field sobriety tests during the course of his investigation. Jones v. State, 459 So.2d 1068, at 1080 (Fla.

2d DCA 1984), affd 483 So.2d 433 (Fla. 1986). See Taylor, 18 FLW at 2234.

The Trial Court suppressed the Respondent's refusal to perform field sobriety tests relying on Herring v. State, 501 So.2d 19 (Fla. 3d DCA 1986). In Herring, the appellant was asked to submit to a gunshot residue hand swab test after his arrest for murder. The appellant was not informed that he was required by law to take the test or that his refusal could be used as evidence against appellant at trial. The Third District Court held that where the appellant did not know that he was required to submit to the hand swab test or that his refusal would be used against him at trial, such a refusal is irrelevant and lacking of probative value. The Respondent contends that this rationale is compelling and should be applied to the instant case.

Arguing against the rule set forth in Herring, the State relies on the rationale found in Wilson V. State, 596 So.2d 775 (Fla. 1st DCA 1992). The First District held, based on constitutional precedent, that the Fifth Amendment privilege against self-incrimination protects an accused's communication, but does not protect non-communicative actions such as a writing or speaking for identification. And as the First District found, field sobriety tests are not protected by the Fifth Amendment and regardless of a suspect's knowledge regarding the adverse consequences of a refusal to comply, such a refusal is probative. Wilson, 596 So.2d at 777, 778. In the case at bar, as in Herring, the Respondent simply did not know that his refusal would be used against him later and opted not to interact with the police officer. To admit evidence of such a refusal is clearly unfair. Herring;, 501 So.2d at 21. Common sense dictates that the Herring standard is correct and should be applied to this set of facts, notwithstanding any

constitutional issue. The Respondent submits the premise in Herring:

> "The unfairness, of course, is that a defendant who is told he may refuse and is told of no consequences which would attach to his refusal may quite plausibly refuse so as to disengage himself from further interaction with the police or simply decide not to volunteer to do anything he is not compelled to do. In contrast, if a defendant knows that his refusal carries with it adverse consequences, the hypothesis that the refusal was an innocent act is far less plausible." Herring, 501 So.2d at 20. See also State v. Cohn, 33 Fla. Supp. 2d 160 Cir. Ct., 18 Cir. (1988).

The First District determined that even had it applied the Herring standard, the facts of Wilson indicated that the defendant was fully aware of the legal requirement to submit a handwriting example and possible adverse consequences of a refusal.

Furthermore, field sobriety tests amount to more than a non-communicative act. These tests are calculated, divided-attention procedures. Unlike viewing a person's walk, speech, handwriting sample or hair sample, field sobriety tests involve combinations of physical and mental actions that are testimonial in nature. Non-communicative acts exist alone and in their natural form, and constitute physical evidence. Each separate field sobriety test is a multi-task combination of physical and mental actions, the purpose of which is to elicit testimonial evidence from a suspect. Article I, Section 9 of the Florida Constitution declares "No person shall be . . . compelled in any criminal matter to be a witness against himself." See Allred V. State, 622 So.2d 984 (Fla. 1993).

At the time the Respondent was asked to exit the vehicle for the purposes of a DUI investigation, a reasonable person would conclude that he was not free to leave. He was not advised of his Miranda rights. He was being asked to disclose possibly incriminating information, even if only a vocal refusal to perform field sobriety tests. Once a person is in a position where it is reasonable to believe he is not free to leave

and is asked to disclose information that may incriminate, the right to counsel attaches. Traylor v. State, 596 So.2d 957 (Fla. 1992). Clearly, the suppression of the Respondent's refusal to perform field sobriety tests is correct whether it be under a Herring relevance standard or a due process standard. Pre-arrest, pre-Miranda field sobriety tests are not compulsory.

Finally, the State in relying on McDonald argues that a refusal to perform field sobriety tests always implies that an accused is intoxicated and refuses because he fears he would perform poorly. It is not reasonable to conclude that the basis of an accused's refusal is "susceptible of no prima facie explanation except consciousness of guilt." State v. Esperati, 220 So.2d 416, 418 (Fla. 2d DCA 1969), cert. denied, 225 So.2d 910 (Fla. 1969).

CONCLUSION

Based on the foregoing facts, argument, and citations of authority, Respondent respectfully requests that this Honorable Court affirm the decision of the Second District Court of Appeal.

CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing has been furnished by U.S. mail to Robert A. Butterworth, Attorney General, 2002 N. Lois Avenue, 7th Floor, Tampa, Florida 33607, this 13 day of DECEMBER, 1993.

Terry M. Staletovich, Attorney at Law
Florida Bar Number: 0937983, for
PUBLIC DEFENDER, SIXTH JUDICIAL CIRCUIT
Airport Business Center, Building #3
14255 - 49th Street North
Clearwater, Florida 34622
(813) 464-6100

TMS/crc

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

VS. Case Number: 82, 631

JAMES E. TAYLOR,

Respondent

INDEX OF APPENDICES