IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

JAMES E. TAYLOR,

Respondent.

Case No. 82,631

ON PETITION FOR REVIEW FROM
THE SECOND DISTRICT COURT OF APPEAL
STATE OF FLORIDA

PETITIONER'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

As stated in the opinion of the Second District Court of Appeal below:

> A St. Petersburg police officer observed Taylor traveling at a high rate of speed. The officer approached Taylor's automobile when he stopped to drop off his passenger. Taylor produced his driver's license and registration, and complied with the officer's request that he exit the car. The officer noted a strong odor of alcohol about Taylor and that he had slurred speech and bloodshot eyes. Before the officer posed any questions, Taylor asked the officer if he would be requested to do any field sobriety tests. When the officer responded that he would be, Taylor stated that he had been told by his attorney not to perform any field sobriety tests.
>
> Upon Taylor's refusal to take the tests, the officer explained the purpose of the tests and Taylor again refused. The officer then indicated "that by his refusal [the officer] would have to take up what [he] had seen to that point in making a decision as far as to whether or not [Taylor] was impaired." No other warning concerning possible adverse consequences was given to Taylor before he was placed under arrest.
>
> At the hearing on Taylor's motion to suppress, the officer indicated that he did not inform Taylor that his refusal to take the tests would be admitted into evidence at trial.

Taylor v. State, 18 Fla. L. Weekly D2233 at D2233-2234 (Fla. 2d DCA October 15, 1993).

The officer did not advise Respondent *one way or the other* concerning whether his refusal to perform any field sobriety tests would be admitted in evidence or otherwise used against him in court (T 5).

The prosecutor noted that Respondent had two prior DUI convic-

tions, one in 1980 and one in 1990, and that Respondent had knowledge of police DUI procedure from his prior DUI arrests (T 5-6).

The county court granted Respondent's motion to suppress; the circuit court granted the State's petition for writ of certiorari and reversed, *Taylor* at D2234; and the Second District granted Respondent's petition for writ of certiorari and quashed the circuit court's opinion. *Taylor*.

SUMMARY OF THE ARGUMENT

The circuit court below correctly reversed the trial court's suppression of Respondent's refusal to perform field sobriety tests because Respondent had no right to refuse to perform them and was not told either that he *did* have such a right or that his refusal to perform the tests would not be used against him in court.

ARGUMENT

WHETHER THE CIRCUIT COURT BELOW ERRED IN REVERSING THE TRIAL COURT'S SUPPRESSION OF RESPONDENT'S REFUSAL TO TAKE THE FIELD SOBRIETY TESTS WHERE RESPONDENT WAS NOT ADVISED THAT HIS REFUSAL TO TAKE THE FIELD SOBRIETY TESTS COULD BE USED AGAINST HIM IN COURT BUT ALSO WAS NOT GIVEN MIRANDA WARNINGS.

This case was controlled in the circuit court below by *Donaldson v. State*, 599 So. 2d 663 (Fla. 2d DCA 1992), wherein the Second District Court of Appeal denied certiorari to review the circuit court's appellate opinion in *State v. Donaldson*, No. CRC-90-16389CFANO. Because the circuit court's opinion in *State v. Donaldson*[1] stands, that court correctly followed its own precedent.

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[1]In *Donaldson*, Respondent relied on, inter alia, *South Dakota v. Neville*, 459 U.S. 553, 103 S. Ct. 916, 74 L. Ed. 2d 748 (1983); *State v. Liefert*, 247 So. 2d 18 (Fla. 2d DCA 1971); *State v.*

The circuit court below[2] correctly concluded that the instant case was *not* distinguishable from *Donaldson*, stating:

> In support of its ruling, the trial court found this Court's holding in Donaldson I limited to whether a field sobriety test constituted an unreasonable search and seizure and therefore distinguishable from the case sub judice. However, it is this Court's opinion that no such interpretation was intended. In Donaldson I, this Court stated:
>
> > When an officer has a well-founded suspicion he can require a suspect to submit to a Field Sobriety Test. If the suspect refuses to submit to the Field Sobriety Test, both his refusal and any comments he makes can be used against him at trial as evidence of guilt.

Esperti, 220 So. 2d 416 (Fla. 2d DCA), *cert. dismissed,* 225 So. 2d 910 (Fla. 1969); *Occhicone v. State*, 570 So. 2d 902 (Fla. 1990) (Grimes, J., concurring), *cert. denied,* ___ U.S. ____, 111 S. Ct. 2067, 114 L. Ed. 2d 471 (1991); and *Pennsylvania v. Bruder*, 488 U.S. 9, 109 S. Ct. 205, 102 L. Ed. 2d 172 (1988).

[2]The opinion below states in pertinent part:

> In State v. Donaldson, CRC 89-06781CFANO, the appellate panel of this Court held that a pre-arrest refusal to submit to a field sobriety test was admissible at trial. This Court thereby [sic] reversed and remanded a trial court determination suppressing evidence of a refusal.
>
> After remand, the Donaldson case was once again appealed to this Court, albeit this time by the defendant. In Donaldson v. State (Donaldson II), CRC 90-16389CFANO, the identical issue was raised. This Court, sitting with a new appellate panel, refused to withdraw from the prior holding. This Court shall do likewise.***The case relied upon by the trial court to support its holding was Herring v. State, 501 So. 2d 19 (Fla. 3rd DCA 1986).

State v. McDonald, No. CRC-9227CFANO (Fla. 6th Cir. Feb. 19, 1993), slip opinion at p. 4 (Petitioner's Appendix D).

The circuit court below also correctly relied on *Wilson v. State*, 596 So. 2d 775 (Fla. 1st DCA 1992), which involves the issue raised in the instant petition for certiorari, to reverse the trial court below. As noted in the circuit court's opinion in the instant case, the *Wilson* court stated in pertinent part:

> Justice Grimes stated that *Herring* [*v. State*, 501 So. 2d 19 (Fla. 3d DCA 1986)] was based upon an erroneous premise, for in *Miranda*[3] cases, such as [*U.S. v.*] *Hale*[, 422 U.S. 171, 95 S. Ct. 2133, 45 L. Ed. 2d 99 (1975)], a defendant is told he has a right to refuse to comply with a police request to make a statement or answer questions, whereas, in non-communication cases, i.e., cases where *Miranda* Fifth Amendment privileges are not at issue, a defendant is not told that he has a right to refuse. Thus, Justice Grimes postulates, there is nothing unfair about admitting into evidence a defendant's refusal to submit to a test because there was no "misleading assurance" in the first place. 570 So.2d at 908.
>
> We are persuaded by Justice Grimes' view of *Herring*. There being no constitutional privilege against taking a test, such as providing a handwriting sample, it follows that there is significant probative value in a refusal to take such a test.

Id. at 778.

The circuit court below agreed with the *Wilson* analysis, explaining: "Clearly, a refusal to take a field sobriety test, as in the case sub judice, would be relevant to whether or not the suspect was intoxicated and declined to take the tests out of fear that he would do poorly." *State v. McDonald*, No. CRC-9227CFANO,

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[3]*Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)

slip opinion at p. 5.

The circuit court's decision in the instant case was correct and in no way a departure from the essential requirements of the law.

CONCLUSION

Based on the foregoing facts, argument, and citations of authority, Petitioner respectfully requests that this Honorable Court quash the opinion of the Second District Court of Appeal below and reinstate the opinion of the circuit court below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Terry M. Staletovich, Assistant Public Defender, Sixth Judicial Circuit, Airport Business Center, Building 3, 14255-49th Street North, Clearwater, Florida 34622, this 30th day of November 1993.

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OF COUNSEL FOR PETITIONER