IN THE SUPREME COURT OF FLORIDA

RONALD J. UNRUH,	)	
	)	
Petitioner,	)	
	)	
versus	)	S.CT. CASE NO. 85,046
	)	
STATE OF FLORIDA,	)	DCA CASE NO. 93-2314
	)	
Respondent.	)	
	)	

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

PETITIONER'S BRIEF ON THE MERITS

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INTRODUCTORY STATEMENT

In compiling this merit brief, Petitioner will refer to pages as numbered by the 5th DCA in that document entitled "INDEX". The legend for these references will appear as (R followed by the appropriate page number). Even though the opinion and opinion en banc have been transmitted to this Court and assigned numbers 403-412 and 420-431 respectively, they are difficult to access. Therefore, Petitioner has assigned different numbers to these documents and included them in the appendix to this brief for easy access. The legend for these references will appear as (A-followed by the appropriate page number.)

STATEMENT OF THE CASE AND FACTS

On December 29, 1991, Petitioner (Unruh) was arrested by Trooper Raymond J. Steele, of the Florida Highway Patrol, being charged with DUI (R 233 & 237). That said Petitioner was transported to the Ormond Beach Police Department (R 235) where Trooper Steele requested that Petitioner submit to a breath test (R 235). Petitioner thereupon advised that his background was in the U. S. Army and he had experience with breath testing machines and from his experience they "don't work right." That under certain conditions they would register when they weren't supposed to and that this had happened many times. He testified that "when we were instructed when we give a breathilizer, we give a blood test right along with it," and that he preferred a blood test (R

237). Petitioner was read his Implied Consent Rights, (R 233) i.e., take the breath test or lose your driver's license. He was further advised that he could "take a breath test or not take a breath test, and if he wanted to have a blood test, he would have to take care of that after I had finished processing him and completing the arrest" (R 233). Petitioner submitted to the breath test (R 235), but only after having requested three different times that he be afforded the opportunity to have an independent blood test conducted (R 235, 238, 239). On cross-examination, Petitioner testified he was advised by Trooper Steele that the only time a blood test was available was when somebody was hurt bad in an accident (R 239). Trooper Steele admitted that Petitioner was at the Ormond Beach Police Department, that Ormond Beach Memorial Hospital was also in Ormond Beach and that said hospital has facilities available to administer a blood test (R 235). Steele says he did not ask Petitioner if he had sufficient funds to pay for a blood test (R 235), however, Petitioner says that Steele advised him that a blood test would cost money and Petitioner advised that he wanted a blood test (R 237) and that he had sufficient funds to pay for same (R 237, 238). Petitioner was transported to the Volusia County Jail, was processed and booked in and, for the first time after his arrest, was allowed the use of a phone, albeit, a phone from which only collect calls could be made. Petitioner was not released from jail until 3:00 PM that afternoon (R 238), even though he had been arrested in the

early morning hours of the same day. Petitioner never received his requested independent blood test. (R 253, 254)

Petitioner subsequently filed a Motion to Suppress (R 218, 219) for failure to comply with Petitioner's request for an independent blood test, which went to hearing and said Motion was denied by the trial court's order dated June 25, 1992, nunc pro tunc to June 10, 1992 (R 3,4) to the date of the hearing. (R 220, 221)

This case went to trial and Petitioner was convicted. (R 222)

Petitioner timely filed his Notice of Appeal on July 14, 1992, challenging the trial court's denial of his Motion to Suppress. (R 224) On appeal, the circuit court rendered it's Order on May 18, 1993, reversing the trial court's ruling (R 331-336). The state filed it's Petition For Writ of Certiorari with the 5th DCA on October 4, 1993 (R 1-155); the 5th DCA rendered it's Order To Show Cause on October 18, 1993 (R 156), and Petitioner timely filed his response thereto. (R 157-383)

On July 15, 1994, the 5th DCA filed it's opinion granting the petition for writ of certiorari and quashed the circuit court's order (A 1-10) This was a 2 to 1 panel decision with a dissenting opinion and a certified question. Pursuant to a Motion for Rehearing and Rehearing En Banc, the 5th DCA, on December 22, 1994, filed it's en banc opinion granting the petition for writ of certiorari and quashed the circuit court's order (A 11-22). This was a 5 to 4 en banc

decision with a certified question.

On January 18, 1995, Petitioner, (Unruh), filed his Notice to Invoke Discretionary Jurisdiction, (R 434) this Honorable Court thereupon entered it's Order Postponing Decision on Jurisdiction and Briefing Schedule (R 435). Petitioner thereupon filed a Motion For Extension of time, the same having been granted by the Court. On March 6th, 1995, Petitioner received a document from the 5th DCA entitled "Index", which assigned page numbers to those documents transmitted to this Court. Petitioner filed an additional Motion For Extension of Time, which is now pending.

SUMMARY OF ARGUMENT

Section 316.1932 (1)(f)3, Florida Statutes (1992) provides that a person charged with DUI has the right to a blood, breath or urine test, to be performed by a qualified person or technician of his own choice, in addition to the test administered by the state, provided he has the funds to pay for said independent test.

Section 316.193 (9), Florida Statutes (1991), provides that after his arrest, a person charged with DUI may not be released from custody until

(a) No longer under the influence.
(b) BAC is 0.05 percent or less.
(c) 8 hours have elapsed from time of arrest.

When read together these two statutes have conflicting provisions. F.S. 316.1932 (1)(f)3, gives an accused the right to an independent test, while F.S. 316.193 (9), in

effect, takes this right away. An accused, being held under 316.193 (9) is not free to procure his own independent test until he is no longer under the influence, at which time the results of his independent test would be worthless. Accordingly, it is impractical or impossible for an accused to obtain a meaningful independent test without the assistance of law enforcement.

In addition, there is another problem. Even though F.S. 316.1932 (1)(f)3 gives an accused the right to an independent test, this is sometimes prevented by law enforcement. In the event this should occur, law enforcement is subject to a penalty. State v. Durkee, 584 So.2d 1080 (Fla. 5th DCA 1991), says F.S. 316.1932 (1)(f)3 conveys a discovery right pursuant to Rule 3.220 (n), allowing the accused to file a motion to dismiss the case or suppress the results of the state's test, all depending upon the severity of law enforcement's activity. This constitutes the punishment or sanction.

To the contrary, State v. Saylor, 625 So.2d 907 (Fla. 2d DCA 1993), says that F.S. 316.1932 (1)(f)3 does not convey a discovery right, thus, there is no improper conduct on the part of law enforcement. There is no question that, on occasion, law enforcement makes errors and/or is guilty of misconduct. Durkee says an accused has a remedy. Saylor says the accused has no remedy.

Petitioner is of the opinion that F.S. 316.1932 (1)(f)3 confers a discovery right and law enforcement must

take affirmative action to assist an accused in obtaining a meaningful independent test pursuant to F.S. 316.1932 (1)(f)3 and 316.193 (9).

A R G U M E N T

Based upon the 5th DCA's certified question to this Honorable Court, which says:

> "IS THE STATE REQUIRED TO TAKE AFFIRMATIVE ACTION TO ASSIST A PERSON IN CUSTODY FOR DUI TO OBTAIN AN INDEPENDENT TEST FOR BLOOD ALCOHOL WHEN IT IS REQUESTED PURSUANT TO SECTION 316.1932(1)(f)3, FLORIDA STATUTES?" (A 19)

Petitioner is of the opinion that said court misinterpreted the circuit court's opinion and that the question, as certified, is incomplete. Said certified question is incomplete because there is a conflict between the 5th DCA and the 2d DCA as to whether or not F.S. 316.1932 (1)(f)3, confers a discovery right. The 5th DCA in State v. Durkee, 584 So.2d 1080 (Fla. 5th DCA 1991), says the statute does confer a discovery right. At ppg. 1082 and 1083 in Durkee, Supra., the court said:

> ". . . We hold that the trial court was correct in it's reading of section 316.1932 (1)(f)3 in the Durkee case, the circuit court was wrong in it's conclusion that suppression of breathilizer results is not an available sanction. . . "

The 2d DCA in State v. Saylor, 625 So.2d 907 (Fla. 2d DCA 1993), says the statute does not confer a discovery right. At pg. 908 in Saylor, Supra., the court said:

> ". . . We hold, that, as a matter of statutory interpretation, section 316.1932 (1)(f)3 does

not confer a discovery right. . ."

Yet, the 5th DCA, without receding from it's opinion in Durkee and Weier, went outside it's jurisdiction to the 2d DCA and embraced Saylor, Supra., in it's ruling in the instant case. At this point in time, there is not only a conflict between the 5th DCA and 2d DCA as to whether F.S. 316.1932 (1)(f)3 confers a discovery right (which should have been certified), but there is also a conflict within the 5th DCA. Durkee says F.S. 316.1932 (1)(f)3 confers a discovery right, while the instant case, Unruh, says it does not confer such right. This does not comport with the conformity of decisions doctrine.

Also, in the question as certified, the 5th DCA seems to be of the opinion that F.S. 316.1932 (1)(f)3 is the only statute to be interpreted in the instant case. This is incorrect. Effective July 1, 1991, the Florida Legislature enacted Section 316.193 (9), Florida Statutes, (a mandatory holding period). It is imperative that Section 316.1932 (1)(f)3, which gives an accused the right to an independent test, be read in conjunction with Section 316.193 (9), which compels that a person arrested for DUI "may not be released from custody: (a) [u]ntil he is no longer under the influence; (b) [u]ntil his blood alcohol level is less than 0.05 percent; or (c) [u]ntil 8 hours have elapsed from the time he was arrested. Accordingly, it is impractical and many times, as in the instant case, impossible for an accused to obtain a meaningful independent test without the

assistance of a law enforcement official. For the foregoing, it is Petitioner's opinion that Section 316.193 (9) should also be included as a part of the certified question. Petitioner would, therefore, respectfully represent that the certified question should read:

> DOES SECTION 316.1932(1)(f)3 CONFER A DISCOVERY RIGHT?
>
> ALSO, WHAT AFFIRMATIVE ACTION, IF ANY, IS THE STATE REQUIRED TO FURNISH TO ASSIST A PERSON IN CUSTODY FOR DUI IN OBTAINING AN INDEPENDENT TEST FOR BLOOD ALCOHOL WHEN IT IS REQUESTED, PURSUANT TO SECTION 316.1932 (1)(f)3 AND 316.193 (9)?

Case law seems to indicate that once the Supreme Court of Florida accepts jurisdiction under one of the provisions of Article V, Section 3, of the Florida Constitution, the Court is not limited to considering only that issue, but may, "in [it's] discretion, consider other issues properly raised and argued before [the Supreme] Court." Savoie v. State, 422 So.2d 308, 310 (Fla.1982). Therefore, once discretionary review is obtained (Petitioner so prays), a party can present in it's merit brief any additional issues that were raised in the district court which the party wishes the Court to decide.

The statutory law and case law governing the answer to the first proposed question, to-wit: "Does Section 316.1932 (1)(f)3, confer a discovery right?", is not indigenous to the state of Florida. Most, if not all of our sister states, have similar statutes which provide one accused of DUI with the right to an independent test. The means most frequently

used to challenge the denial of this right is a motion to dismiss/suppress, and this applies to cases in Florida and out-of-state. The out-of-state cases in which this motion is used to challenge the denial of this right are legion. There are also numerous Florida cases which subscribe to this rule of law. The landmark Florida case seems to be Durkee, Supra., wherein, at pg. 1082 and 1083, the court said:

> ". . . We hold that the trial court was correct in it's reading of section 316.1932 (1)(f)3 in the Durkee case. The circuit court was wrong in it's conclusion that suppression of breathilizer results is not an available sanction. . ."

As to other Florida cases which are in agreement with Durkee, See: State v. Lemmon, No. 66033-WA (Fla. Volusia Cty. Ct., January 27, 1992); State v. Valdes-Fauli, 46 Fla. Supp. 2d 114 (Fla. Dade Cty. Ct 1991); State v. Hastings, 2 Fla. L. Weekly Supp. 81 (Fla. Dade Cty. Ct. 1993); State v. Bock, 1 Fla. L. Weekly Supp. 573 (Fla. Dade Cty. Ct. 1993). Motions to dismiss or suppress were granted in all of these cases. Most every case cited by both Petitioner and Respondent in all prior pleadings in the instant case involved motions to dismiss/suppress. Some were granted and some were denied; however, the question is not whether the motions were granted or denied, the question is whether the motion is the proper vehicle to challenge the denial of the right. The only case found by Petitioner, either in Florida or out-of-state, in which the opinion conflicts with the above, is Saylor, Supra., and not one single case was cited therein, either in or out-of-state, to support it's opinion. It also failed to

cite to F.S. 316.193 (9), and to consider the impact it would have on an accused's right to an independent test. This must have been an oversight since said statute had been in effect in excess of 2 years when the Saylor opinion came down. It would appear that F.S. 316.1932(1)(f)3, does convey a discovery right.

As to the second proposed question, which says, essentially: "What affirmative action to assist, if any, is the state required to furnish. . . pursuant to section 316.1932 (1)(f)3 and 316.193(9)?" As previously stated herein, most all of our sister states have statutes similar to Florida's 316.1932(1)(f)3 (right to independent test); however, Petitioner is unaware of any sister state having a statute similar to Florida's 316.193(9), (mandatory holding statute). As a result of this, Florida's law pertaining to affirmative action to assist is unique and Florida case law should be used, if possible, to interpret our statutes.

In order to support the granting of a motion to dismiss, the accused must be able to show that the conduct or wrongdoing of law enforcement, in preventing the accused from obtaining an independent test, rises to the level of an affirmative finding of bad faith. This constitutes a violation of due process in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 9, of the Florida Constitution, see Durkee, Supra., at pg. 1083; and Bock, Supra., at pg. 575. Since an affirmative finding of bad faith is not involved in

the instant case, Petitioner will not argue this point.

In order to support the granting of a motion to suppress, the accused must be able to show that the conduct of law enforcement, in preventing the accused from obtaining an independent test, rose to the level of wrongdoing; or, that law enforcement failed to take any affirmative action in aiding the accused. It could also be a combination of both.

In dealing with wrongdoing, which does not rise to the level of an affirmative finding of bad faith, it is to be noted that most all of our sister states have dealt with this; since, as hereinbefore noted, most have statutes similar to Florida's 316.1932 (1)(f)3, (right to independent test). There are decisions, both pro and con as to what conduct constitutes wrongdoing sufficient to support the granting of a motion to suppress. Most of the case law, dealing with wrongdoing, generally involves direct refusal, delaying tactics, inactivity or misinformation on the part of law enforcement. E.g., Durkee, Supra., at pg. 1081, "Would not allow test"; " refused to honor requests"; Galiti v. State, 1 Fla. L. Weekly, Supp. 162 (Fla. Cir. Ct. 12th Circuit 1992), at pg. 162, "Manitee County Sheriff's office does not comply with any requests for blood tests"; State v. Hastings, 2 Fla. L. Weekly Supp. 81 (Fla. Dade Cty. Ct. 1993), "Since arrested in Miami Beach, independent test must be performed at Miami Beach Police Station." In dealing with the question as to whether law enforcement is required to take affirmative action to assist an accused in obtaining an

independent test, it all depends on what one believes affirmative action to assist consists of. Generally, affirmative action to assist, involves furnishing the accused with a phone and directory, allowing phone calls to arrange tests, making calls for the accused, transporting for the blood draw.

As to some out-of-state cases involving the use of a phone and directory, see: e.g. State v. Bumgarner, 389 S.E. 2d 425 (N.C. App. 1990), at pg. ?, the facts show he was provided a free telephone, a telephone book and law enforcement assisted in looking up a number. Messner v. State, 481 N.W. 2d 236, 240 (N.D. 1992), at pg. 328, the facts show he was given access to a phone. Puett v. State, 248 S.E. 2d 560 (Ga. App. 1978), at pg. ?, the facts show that he telephoned the local hospital. Harper v. State, 296 S.E. 2d 782 (Ga. App. 1978), at pg. 783, the facts show he was given a phone book and allowed to place at least 2 phone calls. Theel v. Commissioners, etc., 447 N.W. 2d 472 (Minn. Ct. of Appeals 1990). The facts in this case show that he called his sister and four hospitals. Gray v. State, 392 S.E. 2d 290, 291, (Ga. App. 1990), at pg. 290, the facts reflect the jailer made a call for him and he was allowed to make a phone call. Commonwealth v. Rosewarne, 571 N.E. 2d 354 (Mass. 1991), at pg. 355, the facts show he telephoned a hospital to arrange a test. Short v. Commissioner,etc., 442 N.W. 2d 40, 41 & 42 (Minn. App. 1988), at pg. 41 the facts show he was allowed to call his wife and his attorney. From

the foregoing, it would appear that in out-of-state cases, an accused is entitled at least to the use of a phone and a directory in an effort to obtain an independent test. As to Florida cases involving the use of a phone and directory, see, e.g., State v. Hastings, 2 Fla. L. Weekly Supp. 81 (Fla. Dade Cty. Ct. 1993). At pg. 81, the facts show Defendant was not offered the opportunity to make arrangements with Indian Creek Village Police Department or any other testing facility. . . Motion to Suppress granted. Durkee, Supra., at pg. 1081 the facts show that Durkee was told he did not have the right to speak with an attorney. Motion to suppress granted. State v. Lemmon, No. 66033-WA, (Fla. Volusia County Ct. 1992). At pg. 3 of the court's order the facts show he was allowed to call his attorney collect. Motion to Suppress granted. State v. Valdes-Fauli, 46 Fla. Supp. 2d 104 (Fla. Dade Cty. Ct. 1991). At pg. 116, he was not permitted to make a phone call as requested. Motion to dismiss granted. From the foregoing, it would appear that an accused, in Florida, is entitled to the use of a phone. In any event, the use of a phone would be one form of affirmative action to assist.

As to the use of a phone in the instant case, the 5th DCA said in it's opinion at pg. 2, as follows:

> ". . . it is undisputed that he (Unruh) had a phone available to place phone calls. . . (A 12)

This is an incorrect statement and is not supported by the record. The 5th DCA made this statement based upon a

misinterpretation of the circuit court's opinion, wherein at pg. 2 thereof the court said:

> ". . . The argument was made that a telephone was made available to Appellant (Unruh)". (R 333)

In that statement, the circuit court was not saying that a telephone was made available, merely that such argument was made by the state.

The truth of the matter is that the answer to this question can only be found in the transcript of the hearing on the Motion to Suppress. The following is from said transcript at pg. 5. Trooper Steele is testifying on direct examination:

> ". . . I advised him that we didn't have that available (blood test) right now, and that his choice would be based upon whether he could take one - take a breath test or not take a breath test, and if he wanted to have a blood test, he would have to take care of that after I had finished processing him and completing the arrest. . ." (Emphasis Supplied)(R 233)

The following are also excerpts from the transcript. These are questions propounded and answers elicited on cross examination of Petitioner (Unruh):

> ". . . Q. He never denied you access to a phone to try to contact persons to get the blood test administered, did he?
>
> A. Well, when I have - - I will put it this way: He was not in the mood for me to do anything. . ." (R 239)
>
> Q. Did you ask him for the use of a telephone or in some other way to contact somebody to get this blood test administered?
>
> A. When I got to the County Jail, that's when they gave me access to a phone. . . (Emphasis Supplied)(R 240)

As can be seen from the foregoing, a phone was not made

available at the Ormond Beach Police Department. Only after he had been transported, booked and processed into the Volusia County Jail was a phone made available, and then, only collect calls could be made. This is why Petitioner contends, as did the circuit court, that under these conditions, Petitioner's chances of getting a meaningful blood test were practically nil.

There is another line of thinking as to the probability, or even possibility, that anyone would come to the jail house in the wee hours of the morning to administer a blood test to an alleged drunk. See the circuit court's opinion. (R 333)

Turning now to the most hotly contested issue of - affirmative duty to assist - does law enforcement have the responsibility to transport an accused for a blood draw when an independent test is requested? The 5th DCA was of the opinion that law enforcement had no such responsibility. In arriving at this opinion, the 5th DCA at ppg. 5 and 6 of it's ruling, said:

> "We do not find that there is a conflict between the two sections (presumably 316.1932 (1)(f)3, right to an independent test, and 316.193 (9), mandatory holding statute). We find that the circuit court has misinterpreted section 316.1932 (1)(f)3. When read together, the two sections of the statute can be implemented without doing violence to Unruh's due process rights." (Emphasis Supplied) (A 15, 16)

As to this statement, Petitioner is not contending, nor did the circuit court rule, that there was wrongdoing in the instant case which rose to the level of an affirmative

finding of bad faith; which violates Unruh's due process rights and mandates dismissal of the case. The circuit court ruled that a motion to suppress was the proper sanction.

At the bottom of page 6 of it's opinion, the 5th DCA acknowledged the fact that Unruh had the right to an independent test (A 16); however, it never explained how this test could be obtained. This would be a difficult task for one arrested for DUI since F.S. 316.193 (9) says that after his arrest one may not be released prior to the time:

> "(a) His BAC is 0.05 or less.
> (b) He is no longer under the influence.
> (c) Eight hours have elapsed."

An independent test at this time would be worthless.

As hereinbefore set forth, Petitioner has not found an out-of-state case which deals with this problem and it is assumed that none of our sister states have a statute similar to Florida's 316.193 (9). Therefore Petitioner will cite to those Florida cases which deal with the impact F.S. 316.193 (9) has upon the right granted by F.S. 316.1932 (1)(f)3. See State v. Hastings, 2 Fla. L. Weekly Supp. 81 (Fla. Dade Cty. Ct. 1993). In Hastings, Supra., the court granted a motion to suppress where law enforcement failed to aid Defendant in procuring an independent test. The court certified a question to the 3rd DCA. This question was:

> "WHAT AFFIRMATIVE ACTION, IF ANY, MUST THE STATE TAKE ONCE A PERSON IN CUSTODY FOR DUI MAKES A REQUEST FOR AN INDEPENDENT TEST FOR BREATH OR BLOOD ALCOHOL, PURSUANT TO SECTION 316.1932 (1)(f)3, FLORIDA STATUTES?"

The court also acknowledged that an accused has the right to

court's rationale recognizes a right, but

". . .Two of Florida's appellate courts have reached contrary conclusions in their interpretation of this statutory language. In State v. Durkee, 584 So.2d 1080 (Fla. 5th DCA), cert. dismissed, 592 So.2d 682 (Fla. 1991), the Fifth District Court of Appeal held that the State is obligated to honor one's statutory discovery right to an independent blood test. The court determined that under the statute, the State must not prevent a defendant from obtaining an independent test once such a request is made, and that a violation properly results in suppression of evidence. . . ."

". . . The Second District Court of Appeal recently disagreed with Durkee in finding that officers need not comply with a defendant's request for an independent test because such a requirement would 'impose [a] burden on law enforcement or . . .obligated the state to help defendant from obtaining an independent test that the statute is more persuasive. Section 316.1932, which permits a defendant to obtain an arrestee gather evidence for his defense.' State v. Saylor, So.2d , 18 F.L.W. D2238 (Fla. 2d DCA Oct. 15, 1993). . . ."

". . . As the Third District Court of Appeal has not yet addressed this issue, this Court must choose which court's interpretation of the statute is more persuasive. Section 316.1932, which permits a defendant to obtain an independent test must be read in conjunction with section 316.193 (9), which compels that a person arrested for DUI 'may not be released from custody: (a) [u]ntil he is no longer under the influence of alcoholic beverages. . .and affected to the extent that his normal faculties are impaired; (b) [u]ntil it is impractical and many times, as here, impossible for a defendant to obtain a blood alcohol level is less than 0.05 percent; or (c) [u]ntil 8 hours have elapsed from the time he was arrested.' Accordingly, in State v. Bryan, 352 U.S. 432 (1957)(in a DUI case, 'it is crucial to gather evidence relevant to intoxication close in time to when the defendant allegedly committed the crime'). Thus, the Saylor court's rationale recognizes a right, but

an independent test pursuant to F.S. 316.1932 (1)(f)3. and

went on to say:

provides no remedy. Moreover, to adopt Saylor's reasoning would render the language of section 316.1932 superfluous. It is black letter law of statutory interpretation that all the words of a statute should be given meaning whenever possible. See State v. Zimmerman, 370 So.2d 1179, 1180 (Fla. 4th DCA 1979)"

Compare the rationale in Hastings, Supra., with the rationale of the circuit court in the instant case. In the instant case, the court said:

". . . Obviously, the Legislature intended for a person charged under the DUI statute to have access to an independent blood test . . . What the Legislature did not make clear is the method by which the blood test is to be obtained, and who bears what responsibility to see to it that a defendant's request for such a blood test is complied with. In certain cases, including the instant case, there is a conflict between F.S. 316.1932 (1)(f)3 and F.S. 316.193 (9) (the mandatory holding period statute), which states:

"A person who is arrested for a violation of this section may not be released from custody: (a) Until he is no longer under the influence of alcoholic beverages. . .; (b) Until his blood alcohol level is less than 0.05 percent; or (c) Until 8 hours have elapsed from the time he was arrested." (R 332)

"If an individual is in custody and is being held under F.S. 316.193 (9), then clearly he or she is not free to leave on his or her own to go to the nearest hospital to obtain an independent blood test. Yet F.S. 316.1932 (1)(f)3 does not state that law enforcement has a duty to assist a person requesting an independent blood test or to insure that he or she actually receives one. The statutes do not help us reconcile this conflict (R 333). . . The obvious point of confusion and conflict here concerns how a person can exercise his or her right to obtain an independent blood test pursuant to one statute when he or she is being held in custody, pursuant to another statute, for eight hours from the time of arrest. If law enforcement complies with the conditions set forth in F.S

. 316.193 (9), then the accused is no longer under the influence at the time of his or her release, and any blood sample taken after that would be worthless. This aids law enforcement in a defendant's prosecution and hinders the defense. In this case, Appellant had no chance to obtain an independent blood test before his blood alcohol content became non-existent, and then he was precluded from procuring a meaningful blood test. . . (R 333).

. . . The holding period mandated by F.S. 316.193 (9) coupled with the "wrongdoing" of law enforcement officials in failing to assist the Appellant in obtaining the requested blood test would be "state action" preventing him from procuring the blood test pursuant to the right granted him under F.S. 316.1932 (1)(f)3."

". . .Based on the foregoing, the trial court's ruling on the motion to suppress is reversed, and the Appellant is entitled to a new trial. . ." (R 336).

Even though the opinion was not based upon the impact F.S. 316.193 (9), has on F.S. 316.1932 (1)(f)3, there are some practical observations set forth in Lemmon, Supra., as to responsibilities involved in this question. In granting a motion to suppress, the court opined in Lemmon; at pg. 11 thereof:

". . . This Court finds that the Ormond Beach Police Department had an affirmative duty to insure that the defendant's request for a blood test was complied with. It was their duty to implement the entire statute not just those provisions which allowed them to collect evidence to support the prosecution of the defendant. The department should have prepared for the contingency that someone would at some time request a blood, breath or urine test at their own expense. The evidence showed that the department had absolutely no plans to implement that portion of the statute. . . A solution which may be used in these cases would be to take the defendant to the nearest hospital or other facility

> charging the defendant for the mileage and the police officers time, but the Court leaves that to the imagination of the police department. . ."

There are yet some points to be re-visited in the 5th DCA's opinion in the instant case. At pg. 7 of it's opinion, the court said, in effect, that it agreed with Saylor, Supra., that F.S. 316.1932 (1)(f)3 did not confer a discovery right and that to hold otherwise would require law enforcement to transport the accused for the independent test (A 17). Phrased differently, but still meaning the same, "if a discovery right is conveyed law enforcement must transport." From the argument hereinbefore set forth it is clear that 316.1932 (1)(f)3 does convey a discovery right,, ergo, law enforcement must transport.

The unnumbered footnote on pg. 9 (A 19), of the 5th DCA's opinion cites to an annotation found in 45 ALR 4th 11 (1986) to the effect that law enforcement must not prevent or hinder an accused's attempt to obtain an independent test, but they need not assist. The 5th DCA agreed with this premise; however, it is to be noted that this annotation was published in 1986, some 5 years prior to the enactment of F.S. 316.193 (9) and did not consider the impact it would have on an accused's right to procure an independent test.

At pg. 5 of it's opinion in the instant case the 5th DCA ruled that the circuit court's opinion constituted a departure from the essential requirements of law which violated a clearly established principle of law by ruling that law enforcement had an affirmative duty to assist (A

15). This does not appear to be an established principle of law even to the 5th DCA, since the certified question asks, is the state required to take affirmative action to assist? It is to be noted that the 5th DCA's opinion was not a clear-cut decision. It was a 5-4 split.

Also, at pg. 5 of it's opinion the 5th DCA said the trial court's ruling on a motion to suppress comes to the appellate court clothed with a presumption of correctness (A 15). Insofar as this is concerned there were two Volusia County Court cases ruled upon by two different judges in the same courthouse, both ruled upon at approximately the same time and both of which became involved in appellate procedure. Both cases dealt with law enforcement's and defendant's rights and responsibilities when an accused requests an independent blood test. These cases were Lemmon, Supra., and the instant case. In Lemmon the court granted the motion to suppress, while in the instant case the court denied the motion to suppress. Both come before the appellate court clothed with the presumption of correctness. This presumption of correctness rule is not etched in stone as is evidenced by the number of appellate reversals on all subjects.

Should this Honorable Court see fit to rule that F.S. 316.193 (9) does not unfavorably affect an accused's right to procure an independent test, it is to be noted that there are several Florida cases which have ruled, without considering F.S. 316.193 (9) or it's impact, that failure to comply with

the provisions of F.S. 316.1932 (1)(f)3 subjects the state's test to a motion to suppress. See Durkee; Lemmon; Valdez-Fauli; Galati, Supra. There are numerous out-of-state cases which concur with the above.

In light of the conflict in statutory law involved in this case, it may be helpful to consider one of the rules of Construction, also referred to as the Rule of Lenienty. See Section 775.021 (1), Florida Statutes, which says:

> "The provisions of this code and offenses defined by other statutes shall be strictly construed; when the language is susceptible to differing constructions, it shall be construed most favorable to the accused."

C O N C L U S I O N

BASED UPON the cases, arguments and authorities cited herein, Petitioner respectfully requests that this Honorable Court find that F.S. 316.1932 (1)(f)3 conveys a discovery right.

Also, that this Court find that a conflict exists between the provisions of F.S. 316.1932 (1)(f)3 and F.S. 316.193 (9), the results of which require that one accused of DUI must be transported in order to obtain a meaningful independent test when requested.

Respectfully submitted,

French C. Davis
2762 S. Peninsula Drive

Daytona Beach, FL 32118
Phone: (904) 255-5990
FL Bar No: 0018267
Counsel For Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to, BEN FOX, ESQUIRE, at the office of the State Attorney, 251 N. Ridgewood Ave., and the office of the Attorney General, 210 N. Palmetto Ave., both in Daytona Beach, Florida, this 8th day of March, 1995, by hand delivery.

French C. Davis

IN THE SUPREME COURT OF FLORIDA

RONALD J. UNRUH,	)	
	)	
Petitioner,	)	
	)	
versus	)	S.CT. CASE NO. 85,046
	)	
STATE OF FLORIDA,	)	DCA CASE NO. 93-2314
	)	
Respondent.	)	
	)	

APPENDIX TO

PETITIONER'S MERIT BRIEF

IN THE SUPREME COURT OF FLORIDA

RONALD J. UNRUH,	)	
	)	
Petitioner,	)	
	)	
versus	)	S.CT. CASE NO. 85,046
	)	
STATE OF FLORIDA,	)	DCA CASE NO. 93-2314
	)	
Respondent.	)	
	)	

INDEX TO APPENDIX

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT JULY TERM 1994

NOT FINAL UNTIL THE TIME EXPIRES TO FILE REHEARING MOTION, AND, IF FILED, DISPOSED OF.

STATE OF FLORIDA,

Petitioner,

v. Case No. 93-2314

RONALD J. UNRUH,

Respondent.
_____/

Opinion filed July 15, 1994

Petition for Certiorari Review
of Order from the Circuit Court
for Volusia County,
Gayle Graziano, Judge.

Benjamin Fox, Assistant State
Attorney, Daytona Beach,
for Petitioner.

French C. Davis, Daytona Beach,
for Respondent.

THOMPSON, J.

The state filed a petition for writ of certiorari seeking review of an order entered by the circuit court of Volusia County sitting in its appellate capacity. In the case, Ronald J. Unruh ("Unruh") was convicted of driving under the influence ("DUI").[1] The circuit court's order reversed the county court's judgment and sentence in the traffic criminal misdemeanor case because the state's actions violated Unruh's due process. We grant the petition for writ of certiorari and quash the circuit court order.

[1] § 316.193, Fla. Stat. (1991).

Unruh was arrested by a Florida Highway Patrol trooper and charged with DUI. Unruh was transported to the Ormond Beach Police Department where he was asked to take a breathalyzer test after being advised of his implied consent warnings. Unruh told the trooper that he did not like the breathalyzer test because of his experience with breathalyzers in the Army. He stated he preferred a blood test because breathalyzers did not work. He was advised that availability of a blood test was not presently provided for by the state. He was told that his choices were to take the breathalyzer test or to refuse to take the breathalyzer test. He was told, however, that if he wanted a blood test, he could arrange for the test after he was processed and booked into the Volusia County Jail. Unruh took the breathalyzer test. After taking the breathalyzer test, he never again requested a blood test. He was never told that he could not have a blood test if he arranged it. It is undisputed that he had a phone available to place calls.

Unruh filed a motion seeking to suppress the results of the breathalyzer test due to the state's alleged denial of the defendant's request for a blood test. The trial judge denied Unruh's motion after an evidentiary hearing, finding that the defendant was not denied an opportunity to obtain an independent blood test and that law enforcement does not have an affirmative duty to insure that a defendant receives an independent blood test. Finally, the trial court found that the trooper's actions did not actively prevent Unruh from receiving an independent blood test. Unruh was tried, convicted of DUI and sentenced.

Unruh appealed to the circuit court, challenging denial of the motion to suppress. The circuit court, sitting in its appellate capacity, reversed the conviction and remanded for a new trial. The circuit court found that Unruh

requested but never received the blood test even though the facilities were available in the immediate area. The circuit court noted the apparent conflict between section 316.1932(1)(f)3, Florida Statutes,[2] which provides for the test, and section 311.193(9), Florida Statutes,[3] which requires that a person arrested for driving under the influence shall not be released until the person is no longer under the influence, has a blood alcohol level of less than 0.05 per cent or eight hours has elapsed from the time the person was arrested. The circuit court reasoned that in order to effectuate section 316.1932(1)(f)3, a person in custody had to be released to go to the nearest hospital or lab for a blood test or be transported there by the custodians when a person was in custody. The court further reasoned that mere access to a telephone and telephone book was insufficient to comply with the legislative requirements set out in the statutes. The court noted that if the arrested person is held for a minimum of eight hours, the exculpatory evidence, i.e.

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[2] Section 316.1932(1)(f)3 provides:

> The person tested may, at [the person's] own expense, have a physician, registered nurse, other personnel authorized by a hospital to draw blood, or duly licensed clinical laboratory director, supervisor, technologist, or technician, or other person of [the person's] own choosing administer a test in addition to the test administered at the direction of the law enforcement officer for the purpose of determining the amount of alcohol in [the person's] blood or breath or the presence of chemical substances or controlled substances at the time alleged, as shown by chemical analysis of [the person's] blood or urine, or by chemical or physical test of [the person's] breath. The failure or inability to obtain an additional test by a person shall not preclude the admissibility in evidence of the test taken at the direction of the law enforcement officer.

§ 316.1932(1)(f)3, Fla. Stat. (1991).

[3] § 316.193(9), Fla. Stat. (1991).

the blood alcohol level content, has dissipated or been eliminated by the normal functions of the human body. The passage of time, in essence, destroyed evidence that could be quantified by an independent blood test. Therefore, the circuit court held that if an accused is to receive a meaningful independent blood test, but may not be released from custody until no longer under the influence, law enforcement has an affirmative duty to transport the accused to a facility which can administer the blood test. Since the state failed to assist Unruh, his due process rights had been violated and the breathalyzer test results should have been suppressed. The circuit court reversed Unruh's conviction and sentence and remanded the case to the county court for a new trial. The state timely filed this petition for writ of certiorari claiming that the circuit court's ruling constituted a departure from the essential requirements of law resulting in a miscarriage of justice.

We find that there was a departure from the essential requirements of law and hold that law enforcement did not have an affirmative duty to assist Unruh in securing an independent blood test. The departure constituted a violation of a clearly established principle of law which resulted in a miscarriage of justice. Combs v. State, 436 So. 2d 93 (Fla. 1983); see also Fieselman v. State, 566 So. 2d 768 (Fla. 1990). The circuit court violated the principle that appellate courts must view the evidence below, as well as all reasonable inferences and deductions therefrom, in a manner most favorable to sustaining the trial court's ruling. See Owen v. State, 560 So. 2d 207, 211 (Fla.), cert. denied, 498 U.S. 855, 111 S. Ct. 152, 112 L. Ed. 2d 118 (1990); McNamara v. State, 357 So. 2d 410, 412 (Fla. 1978). "The ruling of the trial court on a motion to suppress comes clothed to us with a presumption of correctness and

we must interpret the evidence and reasonable inferences and deductions in a manner most favorable to sustaining the trial court's ruling." Owen, 560 So. 2d at 211; see also Sommer v. State, 465 So. 2d 1339, 1343 (Fla. 5th DCA 1985) (appellate court should not overturn an order denying suppression of evidence if any legal basis to sustain the trial court exists). We do not find that there is a conflict between the two sections. We find that the circuit court has misinterpreted section 316.1932(1)(f)3. When read together, the two sections of the statute can be implemented without doing violence to Unruh's due process rights.

Initially, we review the statutes in question to determine how the legislature intended that they be implemented from their plain reading. First, by requesting a Florida driver's license, a driver agrees to be subjected to testing for impairment. § 316.1932(1)(a), Fla. Stat. (1991). Since driving is a privilege and not a right, the state can impose restrictions on the use of the driver's license. Submitting to an examination to determine one's impairment is one of the restrictions that the state has imposed. The state can evaluate the degree of impairment by use of a breathalyzer, blood test or urine test. § 316.1932(1)(a), (c), Fla. Stat. (1991). In this particular case, the state chose to test Unruh's degree of impairment by use of a breathalyzer. Unruh makes no argument as to the validity of the breathalyzer test. He argues that the test should be suppressed, regardless of whether it was accurate or inaccurate, because he was refused the right to a blood test. We do not agree.

The issue is whether law enforcement has an affirmative duty to assist Unruh in obtaining an independent blood test or whether the duty is limited to not interfering with Unruh's attempts to obtain the blood test. Florida law

does allow Unruh to have a licensed health care provider or technician "administer a test in addition to the test administered at the direction of the law enforcement officer for the purpose of determining the amount of alcohol in his blood or breath or the presence of chemical substances or controlled substances at the time alleged." § 316.1932(1)(f)3, Fla. Stat. (1991). The caveat is that evaluation by the person Unruh selects is in addition to the results of the test required by the state. If Unruh fails to arrange the test or is unable to have his independent test performed, that does not affect the admissibility of the test required by the state. § 316.1932(1)(f)(3).

We are aware of State v. Saylor, 625 So. 2d 907 (Fla. 2nd DCA 1993) and we agree with its holding that section 316.1932(1)(f)3 "does not confer a discovery right and thus there was no improper law enforcement conduct... which justified the county court in suppressing the breath test results." Id. at 908. To hold otherwise would require law enforcement to transport the arrested person to a facility for a blood test, at that person's request. It would also require law enforcement to remain with the arrested person until the test was completed.[4] Arguably, if the person does not have money, it would also require the state to pay for the test. Certainly, the legislature did not intend for a law enforcement officer to be out of service for the time necessary to complete these tests for all persons arrested on the charge of DUI. Nor did the legislature intend for costs of indigents to be paid for by the state.

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[4] § 316.193(9), Fla. Stat. (1991).

Further, we do not believe that our holding in State v. Durkee, 584 So. 2d 1080 (Fla. 5th DCA), cause dismissed, 592 So. 2d 682 (Fla. 1991), applies to this case. In Durkee, the state refused the requests of two arrested persons (Durkee and Weier) for an opportunity to have their blood tested by an independent examiner. Not only were they refused an opportunity to have their blood examined, the state denied they had such a right. The defendant in Durkee requested numerous times to have a blood test and was told that it was not allowed. The defendant also requested to be taken to a hospital for a blood test and to speak to an attorney, but these requests were also denied. The court held that suppression was proper because of the active wrongdoing of the state by refusing to allow an independent test. In the case sub judice, the state never refused Unruh the opportunity to call and arrange for an independent test. They simply stated they would not provide transportation or make the arrangements for the test. Here, the state did not interfere with Unruh's right to arrange for an independent blood test.

We certify a question of great public importance because of the conflict in the various county courts in Florida on this issue:[5]

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[5] Some county courts have held that the state has an affirmative duty to assist. E.g. State v. Lemmon, No. 66033-WA (Fla. Volusia Cty. Ct. January 27, 1992); State v. Valdes-Fauli, 46 Fla. Supp. 2d 114 (Fla. Dade Cty. Ct. 1991); State v. Hastings, 2 Fla. L. Weekly Supp. 81 (Fla. Dade Cty. Ct. 1993). Other county courts have held that the state has no affirmative duty to help. See e.g. State v. Gomisor, 36 Fla. Supp 205 (Fla. Palm Beach Cty. Ct. 1989); Galati v. State, 1 Fla. L. Weekly Supp. 162 (Fla. 12th Cir. Ct. 1992).

This issue of the affirmative duty of the state to assist or to not interfere with an independent blood alcohol test is one that has been discussed in many jurisdictions in the country. An excellent review of the debate is found in an article written by John P. Lundington, annotations, DWI-Private Sobriety Test, 45 A.L.R. 4th 11 (1986). The majority rule appears to be that law enforcement must not prevent or hinder an individual's timely and reasonable attempt to obtain an independent examination, but they need not assist. We agree with that rule.

Is the state required to take affirmative action to assist a person in custody for DUI in obtaining an independent test for blood alcohol when it is requested, pursuant to section 316.1932(1)(f)3, Florida Statutes?

We grant certiorari, quash the order of the circuit court, and reinstate the judgment and sentence entered by the county court.

GOSHORN, J., concurs.
HARRIS, C.J., dissents, with opinion.

HARRIS, C. J., dissenting. Case No: 93-2314

I respectfully dissent.

Although I do not wish to further burden law enforcement, the result of the majority opinion, for all practical purposes, renders meaningless the protection provided by section 316.1923(1)(f)(3), Florida Statutes. DUI arrests normally occur during the evening hours when it would be extremely difficult for the defendant to summon, as the statute requires, a "physician, registered nurse or other personnel authorized by a hospital to draw blood or duly licensed clinical laboratory director, supervisor, technologist, or technician . . . " to his cell to conduct the test before the evidence of his alcohol level had dissipated.

Since the legislature has mandated that one who has been required by law enforcement to be tested to determine the amount of alcohol in his or her system may, upon request and at his or her own expense, have an independent analysis of such alcohol level, law enforcement has an obligation not to hinder or circumvent that right. I agree with the circuit judge herein that to place one who is allegedly under the influence in a cell, even with access to a phone and a phone book, does not meet that obligation. Indeed, if such person, without assistance, is able to schedule the immediate appearance of one named in the statute to come to his or her cell to administer the test, this act itself should be almost conclusive evidence of his or her innocence of the charge.[1]

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[1] The defendant would be demonstrating the ability to remember or the ability to determine a person eligible to perform the test, the ability to "recite the alphabet" at least to the extent of looking up the number, the dexterity required to dial the numbers in the proper sequence, and the ability to persuade a doctor to make a "cell call." This would be far more complex and difficult than the normal roadside sobriety test.

It does not appear too great a burden to require law enforcement, upon request, to transport such a defendant to jail via the emergency room of a local hospital in order that the blood can be timely drawn and properly preserved for future testing. Perhaps any additional costs to the system caused by this short delay would be offset by a greater number of pleas to the charges after the defendants have been permitted to confirm the results of the State's tests.

I agree to certification.

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT JULY TERM 1994

STATE OF FLORIDA,

Petitioner,

v. Case No. 93-2314

RONALD J. UNRUH,

Respondent.
_____/

Opinion filed December 22, 1994

Petition for Certiorari Review
of Order from the Circuit Court
for Volusia County,
Gayle Graziano, Judge.

Benjamin Fox, Assistant State
Attorney, Daytona Beach,
for Petitioner.

French C. Davis, Daytona Beach,
for Respondent.

ON MOTION FOR REHEARING EN BANC

THOMPSON, J.

We have elected to rehear this case en banc.

The state filed a petition for writ of certiorari seeking review of an order entered by the circuit court of Volusia County sitting in its appellate capacity. In the case, Ronald J. Unruh ("Unruh") was convicted of driving under the influence ("DUI").[1] The circuit court's order reversed the county court's judgment and sentence in the traffic criminal misdemeanor case because the

[1] § 316.193, Fla. Stat. (1991).

state's actions violated Unruh's due process. We grant the petition for writ of certiorari and quash the circuit court order.

Unruh was arrested by a Florida Highway Patrol trooper and charged with DUI. Unruh was transported to the Ormond Beach Police Department where he was asked to take a breathalyzer test after being advised of his implied consent warnings. Unruh told the trooper that he did not like the breathalyzer test because of his experience with breathalyzers in the Army. He stated he preferred a blood test because breathalyzers did not work. He was advised that availability of a blood test was not presently provided for by the state. He was told that his choices were to take the breathalyzer test or to refuse to take the breathalyzer test. He was told, however, that if he wanted a blood test, he could arrange for the test after he was processed and booked into the Volusia County Jail. Unruh took the breathalyzer test. After taking the breathalyzer test, he never again requested a blood test. He was never told that he could not have a blood test if he arranged it. It is undisputed that he had a phone available to place calls.

Unruh filed a motion seeking to suppress the results of the breathalyzer test due to the state's alleged denial of the defendant's request for a blood test. The trial judge denied Unruh's motion after an evidentiary hearing, finding that the defendant was not denied an opportunity to obtain an independent blood test and that law enforcement does not have an affirmative duty to insure that a defendant receives an independent blood test.

Finally, the trial court found that the trooper's actions did not actively prevent Unruh from receiving an independent blood test. Unruh was tried, convicted of DUI and sentenced.

Unruh appealed to the circuit court, challenging denial of the motion to suppress. The circuit court, sitting in its appellate capacity, reversed the conviction and remanded for a new trial. The circuit court found that Unruh requested but never received the blood test even though the facilities were available in the immediate area. The circuit court noted the apparent conflict between section 316.1932(1)(f)3, Florida Statutes,[2] which provides for the test, and section 311.193(9), Florida Statutes,[3]

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[2] Section 316.1932(1)(f)3 provides:

> The person tested may, at [the person's] own expense, have a physician, registered nurse, other personnel authorized by a hospital to draw blood, or duly licensed clinical laboratory director, supervisor, technologist, or technician, or other person of [the person's] own choosing administer a test in addition to the test administered at the direction of the law enforcement officer for the purpose of determining the amount of alcohol in [the person's] blood or breath or the presence of chemical substances or controlled substances at the time alleged, as shown by chemical analysis of [the person's] blood or urine, or by chemical or physical test of [the person's] breath. The failure or inability to obtain an additional test by a person shall not preclude the admissibility in evidence of the test taken at the direction of the law enforcement officer.

§ 316.1932(1)(f)3, Fla. Stat. (1991).

[3] § 316.193(9), Fla. Stat. (1991).

which requires that a person arrested for driving under the influence shall not be released until the person is no longer under the influence, has a blood alcohol level of less than 0.05 per cent or eight hours has elapsed from the time the person was arrested.

The circuit court reasoned that in order to effectuate section 316.1932(1)(f)3, a person in custody had to be released to go to the nearest hospital or lab for a blood test or be transported there by the custodians when THE person was in custody. The court further reasoned that mere access to a telephone and telephone book was insufficient to comply with the legislative requirements set out in the statutes. The court noted that if the arrested person is held for a minimum of eight hours, the exculpatory evidence, i.e. the blood alcohol level content, has dissipated or been eliminated by the normal functions of the human body. The passage of time, in essence, destroyed evidence that could be quantified by an independent blood test. Therefore, the circuit court held that if an accused is to receive a meaningful independent blood test, but may not be released from custody until no longer under the influence, law enforcement has an affirmative duty to transport the accused to a facility which can administer the blood test.

Since the state failed to assist Unruh, his due process rights had been violated and the breathalyzer test results should have been suppressed. The circuit court reversed Unruh's conviction and sentence and remanded the case to the county court for a new trial. The state timely filed this petition for writ of

certiorari claiming that the circuit court's ruling constituted a departure from the essential requirements of law resulting in a miscarriage of justice.

We find that there was a departure from the essential requirements of law and hold that law enforcement did not have an affirmative duty to assist Unruh in securing an independent blood test. The departure constituted a violation of a clearly established principle of law which resulted in a miscarriage of justice. Combs v. State, 436 So. 2d 93 (Fla. 1983); see also Fieselman v. State, 566 So. 2d 768 (Fla. 1990). The circuit court violated the principle that appellate courts must view the evidence below, as well as all reasonable inferences and deductions therefrom, in a manner most favorable to sustaining the trial court's ruling. See Owen v. State, 560 So. 2d 207, 211 (Fla.), cert. denied, 498 U.S. 855, 111 S. Ct. 152, 112 L. Ed. 2d 118 (1990); McNamara v. State, 357 So. 2d 410, 412 (Fla. 1978). "The ruling of the trial court on a motion to suppress comes clothed to us with a presumption of correctness and we must interpret the evidence and reasonable inferences and deductions in a manner most favorable to sustaining the trial court's ruling." Owen, 560 So. 2d at 211; see also Sommer v. State, 465 So. 2d 1339, 1343 (Fla. 5th DCA 1985) (appellate court should not overturn an order denying suppression of evidence if any legal basis to sustain the trial court exists). We do not find that there is a conflict between the two sections. We find that the circuit court has misinterpreted

section 316.1932(1)(f)3. When read together, the two sections of the statute can be implemented without doing violence to Unruh's due process rights.

Initially, we review the statutes in question to determine how the legislature intended that they be implemented from their plain reading. First, by requesting a Florida driver's license, a driver agrees to be subjected to testing for impairment. § 316.1932(1)(a), Fla. Stat. (1991). Since driving is a privilege and not a right, the state can impose restrictions on the use of the driver's license. Submitting to an examination to determine one's impairment is one of the restrictions that the state has imposed. The state can evaluate the degree of impairment by use of a breathalyzer, blood test or urine test. § 316.1932(1)(a), (c), Fla. Stat. (1991). In this particular case, the state chose to test Unruh's degree of impairment by use of a breathalyzer. Unruh makes no argument as to the validity of the breathalyzer test. He argues that the test should be suppressed, regardless of whether it was accurate or inaccurate, because he was refused the right to a blood test. We do not agree.

The issue is whether law enforcement has an affirmative duty to assist Unruh in obtaining an independent blood test or whether the duty is limited to not interfering with Unruh's attempts to obtain the blood test. Florida law does allow Unruh to have a licensed health care provider or technician "administer a test in addition to the test administered at the direction of the law enforcement officer for the purpose of determining the amount of

alcohol in his blood or breath or the presence of chemical substances or controlled substances at the time alleged." § 316.1932(1)(f)3, Fla. Stat. (1991). The caveat is that evaluation by the person Unruh selects is in addition to the results of the test required by the state. If Unruh fails to arrange the test or is unable to have his independent test performed, that does not affect the admissibility of the test required by the state. § 316.1932(1)(f)(3), Fla. Stat. (1991).

We are aware of State v. Saylor, 625 So. 2d 907 (Fla. 2nd DCA 1993) and we agree with its holding that section 316.1932(1)(f)3 "does not confer a discovery right and thus there was no improper law enforcement conduct... which justified the county court in suppressing the breath test results." Id. at 908. To hold otherwise would require law enforcement to transport the arrested person to a facility for a blood test, at that person's request. It would also require law enforcement to remain with the arrested person until the test was completed.[4] Arguably, if the person does not have money, it would also require the state to pay for the test. Certainly, the legislature did not intend for a law enforcement officer to be out of service for the time necessary to complete these tests for all persons arrested on the charge of DUI. Nor did the legislature intend for costs of indigents to be paid for by the state.

Further, we do not believe that our holding in State v.

[4] § 316.193(9), Fla. Stat. (1991).

Durkee, 584 So. 2d 1080 (Fla. 5th DCA), cause dismissed, 592 So. 2d 682 (Fla. 1991), applies to this case. In Durkee, the state refused the requests of two arrested persons (Durkee and Weier) for an opportunity to have their blood tested by an independent examiner. Not only were they refused an opportunity to have their blood examined, the state denied they had such a right. The defendant in Durkee requested numerous times to have a blood test and was told that it was not allowed. The defendant also requested to be taken to a hospital for a blood test and to speak to an attorney, but these requests were also denied. The court held that suppression was proper because of the active wrongdoing of the state by refusing to allow an independent test. In the case sub judice, the state never refused Unruh the opportunity to call and arrange for an independent test. They simply stated they would not provide transportation or make the arrangements for the test. Here, the state did not interfere with Unruh's right to arrange for an independent blood test.

We certify a question of great public importance because of the conflict in the various county courts in Florida on this issue:[5]

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[5] Some county courts have held that the state has an affirmative duty to assist. E.g. State v. Lemmon, No. 66033-WA (Fla. Volusia Cty. Ct. January 27, 1992); State v. Valdes-Fauli, 46 Fla. Supp. 2d 114 (Fla. Dade Cty. Ct. 1991); State v. Hastings, 2 Fla. L. Weekly Supp. 81 (Fla. Dade Cty. Ct. 1993). Other county courts have held that the state has no affirmative duty to help. See e.g. State v. Gomisor, 36 Fla. Supp 205 (Fla. Palm Beach Cty. Ct. 1989); Galati v. State, 1 Fla. L. Weekly Supp. 162 (Fla. 12th Cir. Ct. 1992).

IS THE STATE REQUIRED TO TAKE AFFIRMATIVE ACTION TO ASSIST A PERSON IN CUSTODY FOR DUI IN OBTAINING AN INDEPENDENT TEST FOR BLOOD ALCOHOL WHEN IT IS REQUESTED, PURSUANT TO SECTION 316.1932(1)(f)3, FLORIDA STATUTES?

We grant certiorari, quash the order of the circuit court, and reinstate the judgment and sentence entered by the county court.

COBB, GOSHORN, PETERSON and DIAMANTIS,JJ., concur.
HARRIS, C.J., dissents, with opinion in which DAUKSCH, SHARP, W., and GRIFFIN, JJ., concur.
GRIFFIN, J., dissents with opinion in which SHARP, W., J., concurs.

This issue of the affirmative duty of the state to assist or to not interfere with an independent blood alcohol test is one that has been discussed in many jurisdictions in the country. An excellent review of the debate is found in an article written by John P. Lundington, annotations, DWI-Private Sobriety Test, 45 A.L.R. 4th 11 (1986). The majority rule appears to be that law enforcement must not prevent or hinder an individual's timely and reasonable attempt to obtain an independent examination, but they need not assist. We agree with that rule.

HARRIS, C. J., dissenting. **Case No: 93-2314**

I respectfully dissent.

Although I do not wish to further burden law enforcement, the result of the majority opinion, for all practical purposes, renders meaningless the protection provided by section 316.1932(1)(f)(3), Florida Statutes. DUI arrests normally occur during the evening hours when it would be extremely difficult for the defendant to summon, as the statute requires, a "physician, registered nurse or other personnel authorized by a hospital to draw blood or duly licensed clinical laboratory director, supervisor, technologist, or technician . . . " to his cell to conduct the test before the evidence of his alcohol level had dissipated.

Since the legislature has mandated that one who has been required by law enforcement to be tested to determine the amount of alcohol in his or her system may, upon request and at his or her own expense, have an independent analysis of such alcohol level, law enforcement has an obligation not to hinder or circumvent that right. I agree with the circuit judge herein that to place one who is allegedly under the influence in a cell, even with access to a phone and a phone book, does not meet that obligation. Indeed, if such person, without assistance, is able to schedule the immediate appearance of one named in the statute to come to his or her cell to administer the test, this act itself should be almost conclusive evidence of his or her innocence of the charge.[1] Even one whose faculties are impaired has the statutory right to the independent test. The procedures employed in this case deny that right.

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[1]The defendant would be demonstrating the ability to remember or the ability to determine a person eligible to perform the test, the ability to "recite the alphabet" at least to the extent of looking up the number, the dexterity required to dial the numbers in the proper sequence, and the ability to persuade a doctor to make a "cell call." This would be far more complex and difficult than the normal roadside sobriety test.

It does not appear too great a burden to require law enforcement, upon request, to transport such a defendant to jail via the emergency room of a local hospital in order that the blood can be timely drawn and properly preserved for future testing. Perhaps any additional costs to the system caused by this short delay would be offset by a greater number of pleas to the charges after the defendants have been permitted to confirm the results of the State's tests.

I agree to certification.

DAUKSCH, SHARP, W., and GRIFFIN, JJ., concur.

The majority says the issue in this case is whether the breathalyzer administered to the defendant should be suppressed, regardless of whether it was accurate or inaccurate, because the defendant was refused the right to a blood test. If that is the issue, then I join with Judge Harris in dissenting.

Section 316.1932(1)(f)3 provides that a person who has submitted to a test as required by the implied consent law is given the right, at his own expense, to have another qualified person or other person of his own choosing also administer tests. The obvious purpose of this statute is to afford an individual the opportunity to verify or challenge the accuracy of the test given by law enforcement and to document any discrepancy. As Judge Harris has noted, such testing is extremely time-sensitive; the more time that passes between the administration of the two sets of tests the less precise or persuasive the correlation. The statute does provide that the "failure or inability to obtain an additional test by a person" does not preclude the admissibility in evidence of the test taken at the direction of law enforcement. That provision cannot logically mean, however, that when law enforcement takes the defendant into custody (based upon the very test which the defendant seeks to audit), the custodian has no duty to facilitate the exercise of this important right. In my view, the very status as custodian places a duty on the jailer to offer reasonable assistance.

SHARP, W., J., concurs.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Appendix has been furnished to, BEN FOX, ESQUIRE, at the office of the State Attorney, 251 N. Ridgewood Ave., and the office of the Attorney General, 210 N. Palmetto Ave., both in Daytona Beach, Florida, this 8th day of March, 1995, by hand delivery.

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