IN THE SUPREME COURT OF FLORIDA

RONALD J. UNRUH,

Petitioner,

vs. CASE NO.:85046

STATE OF FLORIDA,

Respondent.
_____/

ON DISCRETIONARY REVIEW FROM

THE FIFTH DISTRICT COURT OF APPEAL

PETITIONER'S REPLY BRIEF ON THE MERITS

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INTRODUCTORY STATEMENT

Petitioner will, from time-to-time, refer to the transcript of the testimony, evidence and opinion of the court adduced at the hearing on the Motion to Suppress. The legend for these references will appear as (T- followed by the appropriate page number). A copy of said transcript is contained in the Appendix accompanying this Reply Brief for easy access.

STATEMENT OF THE CASE AND FACTS

Since Respondent agrees with Petitioner's Statement of the Case, there will be no argument made herein as to that subject matter.

Respondent did, however, disagree with Petitioner's Statement of the Facts. It is to be noted that at the conclusion of Trooper Steele's testimony on direct and cross-examination, the court asked if the trooper was to remain or be excused and the state indicated he should stay in the event of any additional questions (T-8). Thereupon Petitioner testified and the trooper was not thereafter recalled to rebut any of Petitioner's testimony; therefore, Petitioner's testimony is uncontroverted.

The only facts which bear looking into are these: Petitioner was arrested for DUI (T-5), was taken to the Ormond Beach Police Department (T-7), took the state-administered breath test (T-7, requested an independent blood test three times (T-9), was told

> ". . . his choice would be . . . 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. . ." (T-5)

he had sufficient funds to pay for an independent test (T- 9 & 10), he was transported to the Volusia County Jail (T-12), he was released from jail at 3 PM that afternoon (T-10), and that a blood test would be worthless at that time (T-10). There was also testimony to the effect that a blood test was not available in the State of Florida:

> ". . . He just said it would be better with a breathilizer and that's the only thing there are in the State of Florida. . ." (T-12) (Emphasis Supplied)

There is also testimony that no phone was made available to Petitioner at the Ormond Beach Police Department to facilitate an independent Blood test

> "When I got to the County Jail, that's when they gave me access to a phone, but he- -" (T-12).

REBUTTAL AND ARGUMENT

Since this Honorable Court has not yet dealt with the questions involved in the instant case, it becomes necessary to cite to Florida Appellate cases, and they are few. The case which most closely comports with the instant case is State v. Durkee, 584 So.2d 1080 (Fla. 5th DCA), cause dismissed 592 So.2d 682 (Fla. 1991)

In Durkee, Supra., there are two citations, the latter of which says "Cause Dismissed". After the 5th DCA ruled in Durkee, the state attempted an appeal to the Florida Supreme Court; however, the appeal was untimely filed and a Motion

For Reinstatement was denied; ergo, the appeal was dismissed. In Durkee, there were two Defendants -- Durkee and Weier. The facts as to Durkee show that the arresting officer and technician advised him that they would not allow him to have a blood test. As to Weier, the arresting officer and technician merely refused to honor Weier's numerous requests for an independent test; yet, Motions to Suppress were the proper remedy for both Defendants. The 5th DCA considered the actions of law enforcement as to both Durkee and Weier to constitute "active wrongdoing." See pg. 1082 in Durkee, wherein the court said:

> ". . . The state's refusal to allow such a test should not be equated with the Statute's reference to a person's "inability" to obtain an additional test. That portion of the statute should not be read as encompassing active wrongdoing by the state, which is the situation in the instant case. . ." (Durkee)

Compare the "wrongdoing" as to Weier, refused to honor his numerous requests, with the "wrongdoing" in the instant case, his choice would be . . . take a breath test or not take a breath test, he just said it would be better with a breathilizer and that's the only thing there are in the State of Florida; when I got to the County Jail, that's when they gave me access to a phone.

The "wrongdoing" in the instant case is certainly as serious as the "wrongdoing" in Weier, wherein they refused to honor his numerous requests.

Footnote 4, at pg. 7, of Respondent's Answer Brief in the instant case, states as follows:

> "Defendant's (Unruh) initial Brief suggests that the certified question should include the preliminary question "Does Section 316.1932 (1)(f)3 confer a discovery right?" As to this question, the Fifth District below aligned itself with the Second Districts opinion in State v. Saylor. 625 So.2d 907 (Fla. 2d DCA 1993) in holding that this section does not confer a discovery right; this holding effectively precludes any remedy for a violation of this section . . . (Emphasis Supplied)

The underlined portion of the above footnote makes a very strong statement, the results of which should be avoided at all cost. It was certainly not the intent of the framers of our Constitution nor is it the intent of the executive, legislative or judiciary branches of our government to give law enforcement the unbridled authority to ride roughshod over the constitutional or statutory rights of our citizens by violating the law and that there is no remedy for such violation. If the Respondent's theory is correct, Petitioner would have been precluded from filing a Motion to Suppress in the first instance; and, this runs counter to every case cited by both Petitioner and Respondent involving F.S. 316.1932(1)(f)3 or it's out-of-state equivalent. The only exception was Saylor, Supra., and now the instant case, both of which contend that there is no remedy if law enforcement violates the provisions of F.S. 316.1932(1)(f)3.

Again, referring to footnote 4 at pg. 7, of Respondent's Answer Brief, it says:

> ". . . the state disagrees with Defendant's implication that such a ruling (Saylor) is unprecedented. . ."

Respondent never implied that the ruling in Saylor was

unprecedented. He merely said on Pg. 9 of his merit brief that "not one single case was cited therein (in Saylor), either in or out-of-state, to support it's opinion. . . ", and a careful reading thereof will support this statement. In order to show that there was a precedent for the ruling in Saylor, the Respondent cited to State v. Castillo, 528 So.2d 1221 (Fla. 1st DCA 1988) and Rice v. State, 525 So.2d 509 (Fla. 4th DCA 1988). In each of these cases the accused requested a pre-arrest breath test and neither was afforded such test. Both then took the state-administered breath test and both filed motions to suppress the state-administered tests based upon their failure to receive the pre-arrest breath tests. The pre-arrest breath test is merely an indicator as to state of sobriety. The law pertaining to this test falls under Section 316.1932 (1)(b)1, Florida Statutes, and says, essentially:

> ". . . The results of any pre-arrest test administered under this paragraph shall not be admissible into evidence in any civil or criminal proceedings. . ." (Emphasis Supplied)

The motions to suppress in both Castillo and Rice, Supra., were denied. The rationale for the denial was that since the wording of the statute precludes prearrest breath test results from being introduced into evidence there would be no effect, either pro or con, on the state-administered test. It is to be noted that no such prohibitive language is found in F.S. 316.1932 (1)(f)3. In fact, it's very purpose is to challenge the results of the state-administered test, and test results obtained pursuant to 316.1932 (1)(f)3 are

admissible into evidence.

As can be seen from the foregoing, neither Castillo nor Rice, Supra., are of any aid or benefit in justifying the decisions in Saylor or the instant case; they still stand alone. Prevailing case law dictates that F.S. 316.1932 (1)(f)3, does confer a discovery right, and this issue should have been certified, since the 2d DCA in Saylor says said statute does not confer a discovery right; while the 5th DCA in State v. Durkee, 584 So.2d 1080 (Fla. 5th DCA 1991), says said statute does confer a discovery right in Durkee, but does not in the instant case.

On pg. 9 of it's Answer Brief, Respondent cites to Caplor v. Greenville, 422 F.2d 299 (5th Cir. 1970). See pg. 300, wherein a direct quote from Caplor says:

> "The jail had no equipment for scientific tests to determine intoxication. At no time did appellant ask for any kind of test, scientific or otherwise."

Also, at pg. 9 of it's Answer Brief, Respondent cited to Morgan v. State, 303 So.2d 393, 394 (Fla. 2d DCA 1974). This was a jury trial and the court said, essentially, that the jury should consider that testimony which it believed to be false, as well as that testimony which it believed to be true, in reaching it's verdict. Of course, the same would be true of the trial court in a Motion to Suppress. In the instant case, it appears as though the trial court relied predominantly upon the law in reaching it's decision. See footnote 7, in Respondent's Answer Brief:

> "THE COURT: My understanding of the law in

addition to the implied consent breath test, to make a blood test, it's up to him to get it. He can call his own doctor. (Emphasis Supplied)

On ppg. 9, 10 and 11 of it's Answer Brief, Respondent deals strictly in speculation, assumption, opinion and inference. On pg. 9, Respondent says:

". . . it would not have mattered whether a phone was specifically offered to Defendant or not - - he clearly would not have attempted to use it." (Emphasis Supplied)

This statement deals in speculation, assumption and opinion. It is unknown as to what Petitioner would have done had he been offered a phone. He may or may not have attempted to obtain a blood test.

Again, at pg. 9, Respondent said:

". . . one could infer from the record that the trial court actually rejected this testimony"

This statement constitutes an inference that cannot be supported by the record. The only testimony in the record as to when a phone was first made available to Petitioner came from Petitioner himself on cross-examination, where at (T12), he testified as follows:

"A. When I got to the county jail, that's when they gave me access to a phone, but he -- (Emphasis Supplied)

At page 10, of it's Answer Brief, Respondent said:

". . . Trooper Steele did not say where this processing and arrest would be 'finished' and 'completed' - - it could have been while still at the police department. . ." (Emphasis Supplied)

This is an inference based upon speculation and is not

supported by the record. See (T12) again, which is uncontroverted.

Again on pg. 10, Respondent said:

> ". . . It could be that the Fifth District was referring to the phone that, by the Defendant's own testimony, was made available at the jail . . ."(Emphasis Supplied)

This statement consists of pure speculation, and, in addition, had to be taken completely out of context in order for the statement to be made. See (A 12), Appendix to Petitioner's Merit Brief. The 5th DCA went through a colloquy of what happened at the Ormond Beach Police Department:

> ". . . Unruh was transported to the Ormond Beach Police Department where he was asked to take a breath test. . ." ". . . He had told the trooper he didn't like breath tests. . ." ". . . He was told to take the breath test or refuse to take it . . ." " . . . if he wanted a blood test he could arrange for that after he was processed and booked into the Volusia County Jail. . ."(Emphasis Supplied) ". . . He never again requested a blood test. . ." "It is undisputed that he had a phone available to place calls. . ." (Emphasis Supplied)

From the foregoing it is obvious that the 5th DCA is saying Petitioner had a phone available to him at the Ormond Beach Police Department, and, this is incorrect. (See T12)

At pg. 11, of it's Answer Brief, Respondent said:

> ". . . the Fifth District could have deemed any delay during this time to be insignificant. . ." (Emphasis Supplied)

This, again, is pure speculation and is not based upon the record. All of these statements made by the Respondent at ppg. 9, 10 and 11 of it's Answer Brief, fall in the category

of "but what if" or "wishful thinking". It brings to mind that old adage:

> "If we had some ham, we could have ham and eggs, if we had some eggs."

Going now to ppg. 11, 12 and 13 of Respondent's Answer Brief where Respondent refers to 45 A.L.R. 4th 11, at Section (2)(a), ppg. 17 and 18. Said annotation starts out with the statement:

> "The Constitutional right to an independent sobriety test is really a right to police noninterference with the motorist's obtaining such a test. There is no constitutional right to police assistance in obtaining the test. . ." (Emphasis Supplied

Most all of this annotation deals with an accused's constitutional right to obtain an independent test. Durkee, Supra., says, essentially: "If the conduct of law enforcement rises to the level of an affirmative finding of bad faith, then the accused's constitutional rights have been violated and the case is subject to dismissal." Petitioner filed a motion to suppress -not a motion to dismiss. Constitutional rights are not applicable to the instant case.

The remaining portion of the cited annotation deals with the violation of an accused's statutory right to an independent test. As stated at pg. 20 of Petitioner's Merit Brief, this annotation was published in 1986, some 5 years prior to the enactment of F.S. 316.193(9), (mandatory holding statute) and did not consider the impact it would have on an accused's right to procure an independent test.

There seems to be no dispute as to the fact that F.S.

316.1932 gives one accused of DUI the right to an independent test; however, it is silent as to how this test is to be obtained. Respondent contends that law enforcement is not required to furnish the accused with a phone nor is it required to transport. What other options are open to an accused in obtaining an independent test? It would appear that there are none.

In support of it's contention that if an accused doesn't request a phone, he doesn't get one, Respondent, at pg. 14 of it's Answer Brief, cites to Short v. Commissioner of Public Safety, 422 N.W. 2d 40, 41 & 42 (Minn. App. 1988); State v. Snipes, 478 S.W. 2d 299 (Mo. 1972); Capler v. Greenville, 422 F.2d 299 (5th Cir. 1970) and State v. Messner, 481 N.W. 2d 236, 240 (N.D. 1992). These cases do not support Respondent's contention. In Short, Supra., Defendant was allowed to make two phone calls. In Capler, Supra., at no time did appellant ask for any kind of test, scientific or otherwise. In Messner, Supra., he was promptly placed in a jail cell with access to a phone. In Snipes, Supra., he refused to take the state-administered test; upon request for a blood test, he was transported to the Boone County Hospital, where that was done and was given the opportunity to call a physician, but did not do so. At pg. 13 of it's Answer Brief, Respondent says: "These cases unanimously hold that access to a phone (in order to arrange a blood draw at the place of custody) is sufficient. (Emphasis Supplied) This, obviously, constitutes affirmative

action to assist. Yet, at pg. 11 of it's Answer Brief, Respondent contends that "there is no affirmative duty to assist, only a duty not to interfere." It is uncontroverted that Petitioner did not have access to a phone at the Ormond Beach Police Station (the place of custody).

Respondent next cites to three Florida Cases: State v. Durkee, 584 So.2d 1080 (Fla. 5th DCA) cause dismissed 592 So.2d 682 (Fla. 1991); State v. Saylor, 625 So.2d 907 (Fla. 2d DCA 1993) and State v. Unruh, 20 Fla. L. Weekly D30 (Fla. 5th DCA Dec. 22, 1994).

Petitioner's argument as to Durkee will appear on a later page. The next case cited to by Respondent, is Saylor, Supra. Only two things are of any importance as a result of this ruling. (1) The 2nd DCA ruled that there is no remedy for an accused who requested an independent test even if the denial of said test was wrongful, since F.S. 316.1932 (1)(f)3 does not confer a discovery right; and (2) To rule otherwise would impose a burden on law enforcement which the court felt was not the intent of the legislature. Basically, the court said that law enforcement can commit any wrongful act it wants to since there are no sanctions. The Respondent next cites to the instant case, Unruh, Supra. In Unruh, the court, without receding from it's opinion in Durkee, ruled with Saylor, Supra., and held that F.S. 316.1932 (1)(f)3 did not confer a discovery right. At this point, there is a conflict between the 5th DCA in Durkee and the 2d DCA in Saylor. Durkee says F.S. 316.1932 (1)(f)3 confers a

discovery right, while, Saylor says it does not. In addition, there is a conflict within the 5th DCA. Durkee says said statute confers a discovery right, while Unruh says it does not.

At ppg. 17 and 18 of it's Answer Brief, Respondent cites to Hansbrough v. State, 509 So.2d 1081, 1084 (Fla. 1987), wherein the court said essentially that the state cannot withhold material evidence, but it is not required to actively assist the defense to prepare it's case. Respondent also infers that Petitioner is suggesting "no criminal defendant has a right to obtain exculpatory evidence unless there is a specific statute particular to a Defendant's case which allows such right." Actually, what Petitioner is saying is that it is axiomatic that any defendant has the right to gather exculpatory evidence for his defense; however, in addition to this general right, in DUI cases there is a specific statute which gives an accused a specific right to gather specific exculpatory evidence, to-wit: an independent blood test in addition to the state administered test.

Respondent also cites to Houser v. State, 474 So.2d 1193 (Fla. 1985). Houser says, essentially, that the state is not required to preserve the same blood sample, taken at police direction, for retesting. Petitioner, is not concerned with retesting anything. Footnote 1, at pg. 1195 in Houser, interprets F.S. 316.1932 (1)(f)3 as giving the accused the right to have his own sample taken and analyzed

by an independent expert. The question is how and when does the accused procure said test?

Respondent again refers to Houser, Supra., at pg. 20 of it's Answer Brief, wherein it states:

> ". . . section 316.1932 (1)(f)3 (the independent blood statute) is merely to allow a defendant who is offered a test the "opportunity" (as stated in Houser, Supra.,) to question the results of that test (i.e., by providing the defendant with the option to obtain his own test)."

The "opportunity" to challenge the results of the state-administered test refers to: questioning as to the devices used in testing, right to cross-examine the technician, question the reliability of blood alcohol testing and attack the reliability of the results. Every accused has these rights in the absence of 316.1932 (1)(f)3. What the statute does is to give the accused the additional right to question the state-administered test results by an independent test.

It is to be noted that even the legislature is of the opinion that a blood test is more accurate than a breath test. Section 316.1933 (1), Florida Statutes provides, essentially, that if an accused operates a motor vehicle in such a manner as to cause death or serious bodily injury and law enforcement has cause to believe said accused was under the influence, such person shall submit to a test of his blood, and reasonable force may be used, if necessary, to implement said test. A breath test is not an alternative.

At ppg. 19 and 20 of it's Answer Brief Respondent attempts to equate Section 316.1932 (1)(d) with Section 316.1

932 (1)(f)3. In order to rebut this argument, it is necessary to refer back to Section 316.1932 (1)(a), which says essentially: A person who operates a motor vehicle in the State of Florida

> ". . . shall be deemed to have given his consent to submit to an approved chemical test. . ."
> ". . . The. . . test shall be incidental to a lawful arrest and administered at the request of a law enforcement officer. . ."
> (Emphasis Supplied)

This Section makes it mandatory that an accused be offered a breath, blood or urine test by law enforcement to determine his BAC. However, if law enforcement fails to offer such test, Section 316.1932 (1)(d) says, essentially:

> ". . . such person may request the arresting officer to have a chemical or physical test made . . . and, if so requested, the arresting officer shall have the test performed. . ."
> (Emphasis Supplied)

This is only requiring law enforcement to do what it was required to do in the first place.

The language in Section 316.1932 (1)(f)3, was not made mandatory since the accused may feel that the results would not be exculpatory or he doesn't have the funds.

There is doubt as to the practicality of an accused's ability to procure a blood draw by use of a phone. As was so aptly put by the circuit court, sitting in it's appellate capacity,

> ". . . It is unrealistic to think that a doctor or other qualified technician would make a house call to the police station in the wee hours of the morning to give a blood test to an alleged drunk. . ."

It is uncontroverted that Petitioner, in the instant

case, did not have access to a phone at the Ormond Beach Police Department; therefore, the opinion of the circuit court, sitting in it's appellate capacity in the instant case is apropos

> ". . . 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."

The dissenting opinions in the 5th DCA's en banc decision should not be overlooked. They contain some very interesting and informative observations.

CONCLUSION

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,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to BEN FOX, ESQUIRE, Assistant State Attorney at 251 N. Ridgewood Ave., and to CARMEN CORRENTE, ESQUIRE, Assistant Attorney General, at 444 Seabreeze Blvd., 5th Floor, both in Daytona Beach, Florida, this 24th day of May, 1995, by hand delivery,

Attorney

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