O. a. 5-30-96

IN THE SUPREME COURT OF THE STATE OF FLORIDA

WILLIAM E. BURNS,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.
_____/

CASE NO.:86,520

FIFTH DISTRICT COURT
OF APPEAL CASE NO.: 94-457

AN APPEAL TO REVIEW THE DECISION
OF THE FIFTH DISTRICT COURT OF
APPEAL REVERSING THE TRIAL COURT'S
GRANTING OF APPELLANT'S MOTION TO SUPPRESS

INITIAL BRIEF ON THE MERITS

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PREFATORY STATEMENT

With the permission of this Honorable Court, reference to the Appellant, William E. Burns, shall be by the term "Defendant" or by the use of Mr. Burns' name. Reference to the Appellee, Statte of Florida, shall be by the term "State."

Reference to the record on appeal shall be by the letter "R" followed by the page number in the record at which the material immediately preceding appeared in the record.

STATEMENT OF THE CASE AND FACTS

The Appellant pursuant to Rule 9.210 Fla. R. App. P. respectfully submits the following Statement of Case and Facts:

The Appellant, Mr. William Burns, is a defendant in a Driving Under the Influence case. He filed a motion to suppress evidence at roadside (field sobriety tests and statements) and at the Orange County Breath Testing (interrogation, requested field sobriety and breath tests, and refusals thereof). His motion was based on the police failure to advise him of various rights under Article One, Sections 9 and 16 of the Florida Constitution and as required by this Court in Traylor v. State, 596 So.2d 957 (Fla. 1992) and Allred v. State 622 So.2d 984 (Fla. 1993).

A suppression hearing was held and testimony heard by the trial court. The trial court had the opportunity to observe the demeanor of the arresting officer and William Burns, both of whom testified. The evidence thereat showed the following:

Mr. Burns was driving when he was stopped by the arresting officer through the use of her blue, flashing lights, which only police can have. (R 12, 37) Mr. Burns would not have stopped for a private citizen. (R 38) After exiting his vehicle, he observed that the officer was wearing a uniform, police patches, a gun, a badge and other indices of being a police officer. (R 14, 3940) Additionally, Mr. Burns observed that the vehicle used to stop him, had thereon police insignia, names and other characteristics of a marked police vehicle. (R 13, 39) Mr. Burns felt compelled to stop in that if he did not, the police

would have chased him down and brought additional charges.(R 38)

As soon as Mr. Burns exited his vehicle, he requested to be let go so he could go home which was only around the corner. (R 18-19, 41) The officer denied that request. (R 19) Mr. Burns repeated that request throughout the detention on roadside, including prior to any field sobriety tests. (R 19, 41) Each time the officer denied the request.

When the arresting officer first testified at the suppression hearing, she swore she had never told Mr. Burns he could not leave. (R 10, 18) When confronted with her sworn arrest report, the arresting officer finally confessed that she had told him he could not leave. (R 18-19)

The testimony also showed that the arresting officer had ordered Mr. Burns out of his vehicle (R 15); That she had instructed him to stand at a particular location (R 40); That she had ordered him repeatedly to keep his hands out of his pockets (R 15, 40); That would not allow him back into his vehicle (R 16); and that he had obtained registration and insurance papers from Mr. Burns and retained them, without which he could not legally drive away. (R 17) Mr. Burns did not think these were simply requests that he could ignore. (R 40)

Mr. Burns felt if he tried to leave, the officer would attempt to stop him (R 42), and the officer testified she would have. (R 16) Additionally, because of her orders and refusal to let him go, Mr. Burns felt that he would suffer severe legal consequences if he did not follow her orders, e.g. resisting arrest. (R 40) He did not feel free to break off this encounter

with the police. (R 45)

Although the officer allegedly stopped Mr. Burns for making a wide turn, she never issued a citation for any infraction (R 47) Within a "few seconds" the officer started conducting a DUI investigation. (R 33) This occurred at 10:38 p.m. at night in a deserted condominium parking lot. (R 23) There was light traffic on this residential, side street at this time of night. (R 22)

The arresting officer questioned Mr. Burns at roadside about his drinking (R 33) Mr. Burns testified that such questioning made him think he was being investigated for a DUI. (R 41) Even the officer admitted that asking such questions could make a person feel this. (R 33-34) Then the officer ordered Mr. Burns to perform field sobriety tests at roadside, including the alphabet test. (R 7-9, 41) The one leg stand and walk the line tests were also requested, both of which required Mr. Burns to count during the tests. (R 9) At the time of administering these tests, the officer already felt she had probable cause to arrest Mr. Burns for DUI. (R 19) Mr. Burns performed these tests at roadside, and did not feel free during said tests to simply break off this encounter with the police. (R 6-9, 45)

Mr. Burns felt that the necessity of counting during these field sobriety tests, divided his attention and distracted him from performing well on the physical parts of the tests. (R 4445) Mr. Burns testified he would have done fine if he had not had to count during these tests at roadside. (R 45) The officer

admitted these tests divided the suspect's attention (R 28-31) and that a person may perform better on the physical portion if they did not have to count. (R 31)

The officer arrested Mr. Burns for DUI and took him to a special breath testing center located on South Orange Blossom Trail in Orlando. (R 45) It was solely the decision of the arresting officer to take Mr. Burns to this testing center, instead of directly to jail which is at another location. (R 2425) This is a testing center run by the Orange County Sheriff's Office. (R 26) It is housed in a building that was designed, constructed and remodeled especially to meet the needs of DUI testing and videotaping, e.g. holes cut in the walls for cameras. (R 26, 47)

There are telephones in the Breath Testing Center which Mr. Burns could have used to contact an attorney. (R 25) The arresting officer never offered Mr. Burns an opportunity to use those telephones. (R 25) Neither, had the officer called her dispatcher to have them call an attorney to meet Mr. Burns at the testing center, even though that was possible, since this officer had police dispatch on other accessions contact wrecker services to tow suspects' vehicles. (R 24)

There was no evidence law enforcement had made any arrangements to allow any suspects at the Breath Testing Center to contact an attorney. This is true, even though as in Mr. Burns' case, he had sat for a period at the Center when he could have called an attorney. (R 52) Instead, the arresting officer subsequently put Mr. Burns on videotape for purposes of gashing

evidence of his impairment.

First, the officer asked Mr. Burns on videotape questions about his name, age, address and so forth. (R 52) The officer already had this information and did not take notes while asking these questions. (R 52) These questions were not asked in order to fill out any reports. (R 42) In fact when Mr. Burns was later booked into the jail, the same questions were again asked. Mr. Burns felt these videotaped questions were designed to trip him up and make a mistake on video. (R 53)

Next the officer on videotape asked Mr. Burns to take certain field sobriety tests. (R 48) The officer had prior thereto told Mr. Burns what field sobriety tests would be requested. (R 47-48) Mr. Burns did not want to do the counting or recitation of the alphabet on videotape. (R 49) No one offered him the opportunity to do these tests without the verbal portions thereof. (R 49) Because he did not want to perform the verbal portion of these field sobriety tests, he declined to do them. (R 49)

Finally, the officer requested Mr. Burns take the breath test. (R 50) Mr. Burns declined. (R 50) If the police would have offered or allowed him to speak with an attorney prior to this decision, Mr. Burns testified he would have done so. (R 51) Mr. Burns did not know of his right to call an attorney. (R 51) No one had read Mr. Burns any of his rights either at roadside, or at the testing center until after all of the testing and videotaping at the Center was completed.(R 35, 51).

Only then for the first time, did the police tell Mr.

Burns he had a right to an attorney and a right to remain silent. (R 20, 35) In doing so, the arresting officer told Mr. Burns at the testing center he had the right to talk to an attorney "now." (R 34-35) At that time, Mr. Burns, upon being read his rights for the first time, invoked his rights. (R 35)

The trial judge found that the Petitioner was in custody at roadside for purposes of Article one, Section 9, and suppressed the statements made during the field sobriety tests as Defendant had not been advised of his rights under Traylor and Allred.

The trial court also implicitly found that the videotaped questioning of the Defendant after his arrest was violative of both his right to remain silent under Section 9 and his right to have an attorney present under Section 16 at this "crucial stage", e.g. interrogation, and suppressed the videotaped questioning of Mr. Burns. The trial judge further suppressed under Section 16, the request of Mr. Burns to take field sobriety tests, e.g. alphabet tests, the request for him to take a breath test, and Mr. Burn's refusals thereof. The trial court apparently found said testing after arrest to constitute a "crucial stage" for which no written waiver of counsel had been obtained, and that it was "feasible" at the Breath Testing Center for Mr. Burns, who was in "custodial restraint" to contact an attorney prior to taking a breath test.

In the trial court's order granting suppression of this evidence, the trial court certified this issue to the Fifth District Court of Appeal under Rule 9.160(e)(2), Fla. R. App. P. From that trial court order, the State appealed to the Fifth

District Court of Appeal. The Fifth District accepted the appeal and rendered an opinion on March 31, 1995 reversing the trail court on most major issues herein, and ruling thereon in favor of the State. Mr. Burns timely filed a Motion for Rehearing. The Motion for Rehearing was denied, but the Fifth District reissued it Order on August 25, 1995. Therefrom, Mr. Burns respectfully filed his notice under 9.120, Florida Rule of Appellate Procedure.

SUMMARY OF ARGUMENT

The Fifth District Court of Appeal herein ruled on the rights provided by the Florida Constitution, Article one, section 9 and section 16, as those rights apply to persons stopped and arrested for the offense of Driving Under the Influence of an alcoholic beverage.

Traylor v. State, supra, defined a "crucial stage" as being that which significantly affects the outcome of the case. Breath tests are the most important evidence in DUI cases being not only prima facia evidence of impairment, but an actual element of the crime under Fla. Stat. 316.193(1)(b). Article one, section 16 grants the right to speak with an attorney prior to any "crucial stage." That being so, persons arrested for DUI have the right to an attorney prior to taking the breath test.

The Supreme Courts of Minnesota and Oregon have held persons at this juncture in DUI cases have the right to consult an attorney. While this is not an absolute right, these courts have held defendants must be given an "opportunity" to speak with an attorney and reasonable assistance, e.g. provide telephone and telephone book, and a reasonable amount of time. This could be done without interfering with the breath test, e.g. during observation period.

Federal law is inapplicable because Sixth Amendment rights do not attach until after filing of formal charges. The Florida Constitution can, and does, offer more protection in this area.

Moreover, the Fifth District's decision violates Article one, sections 9 and 16 in that it authorizes actual police

questioning of persons in custody based on whether the content of their answers are incriminating. Custodial interrogation, however, has always been improper, absent warnings, regardless of whether the answers are incriminating. The same would be true of testimonial field sobriety tests, which the Fifth District seeks to avoid by defining them as "non-testimonial" field sobriety tests to which section 9 rights do not apply. Not only do these require warnings under section 9, such interrogation constitutes a "crucial stage" therefore implicating the section 16 right to counsel.

The decision herein also effectively adopts a "per se" rule with regard to traffic stop which makes it error "as a matter of law" for a trial judge to rule a person in custody if the Berkemer criteria are present. This is true even if the defendant's request to leave is denied, the arresting officer testifies falsely at the hearing, and the trial judge after seeing the witnesses finds the circumstances would lead a reasonable person to believe he was in custody. This invades the trial court fact-finding authority and its duty to determine the credibility of witnesses.

The Fifth District impermissible looked at whether this was an ordinary stop and the officer had the right to detain Mr. Burns instead of whether a reasonable person in Mr. Burns' position would have felt detained.

Mr. Burns would request this Court reaffirm that those rights apply to all criminal defendants, even those accused of driving under the influence.

ISSUE I

WHETHER A PERSON ARRESTED FOR DUI HAS A RIGHT TO COUNSEL UNDER ARTICLE ONE, SECTION 16 OF THE FLORIDA CONSTITUTION

This Court in Traylor v. State, 596 So.2d 957 (Fla. 1992) stated as to our rights under Article one, section 16:

> In order for [section 16] rights to have meaning, it must apply at least in each crucial stage of prosecution. For purposes here, "crucial stage" is any stage that may significantly effect the outcome of the proceeding.

596 So.2d at 968. Despite this clear definition, none of the post-arrest activities at the DUI Testing Center were found by the Fifth District to be a "crucial stage," so as to invoke, or make applicable, section 16 rights in this case. Yet, this ruling clearly overlooks the essence of a DUI case.

First, the breath test is the most crucial element in a DUI case because the State need only prove driving and an unlawful blood or breath alcohol level to obtain a conviction. Florida Statute 316.193(1)(b). It even is evidence of impairment:

> If there was at the time 0.08 percent or more by weight of alcohol in the person's blood or breath, that fact shall be prima facie evidence that the person was under the influence of alcoholic beverages to the extent that his normal faculties were impaired. Moreover, such person who has a blood or breath alcohol level of 0.08 percent or above is guilty of driving or being in actual physical control of a motor vehicle, with an unlawful blood or breath alcohol level. (emphasis added)

Florida Statute 316.1934(c). The Florida Standard Jury Instructions follow this law by instructing the jury to find the defendant guilty if his or her blood alcohol level is above the

legal limit. There thus can be little doubt that in DUI prosecutions, the results of the breath test "may significantly effect the outcome."

The dominant purpose of the breath test is to obtain evidence for the criminal prosecution. In fact, the test results can affect everything from the prosecutor's plea offers to the trial court's sentencing decisions. The breath test is thus a critical stage, if not the most critical stage, of the entire DUI prosecution.

By its actions, the State and law enforcement has proven this as indicated by the spending of hundreds of thousands of dollars to construct a special DUI testing center in Orange County, law enforcement agencies send officers to special DUI training; and the law imposing harsh drivers license restrictions for refusing to take such tests. It would be a legal fiction to say that all of these resources, manpower and effort was spent to gather anything other than critical evidence which would significantly affect the outcome of the case.

Courts in other states have found there is a right to an attorney at this crucial juncture. In Friedman v. Commissioner of Public Safety, 473 N.W.2d 828 (Minn. 1991) the Minnesota Supreme Court reviewed its prior rulings which had found that the request for a breath test is a "critical stage" in the criminal process:

> [W]e noted that the choice of whether to submit to the chemical testing procedure is a very important one for the individual driver. A driver must make a critical and binding decision regarding chemical testing, a decision that will affect him or her in

> subsequent proceedings. Therefore, when asked to submit to a chemical test, a driver finds him- or herself at a "critical stage" in the DWI process.

473 N.W.2d at 832. The Court reaffirmed that a driver stopped for a possible DUI violation and requested to submit to a chemical test "is at a critical stage triggering the right to counsel" under the Minnesota Constitution. "In the case of a DUI, the chemical test is more than just a search. The act itself could produce the evidence leading to conviction before any trial is even necessary." 473 N.W. 2d at 837.

The Court emphasized that the "purpose of the right to counsel is to protect the lay person who lacks both the skill and knowledge to defend him- or herself." That person should be looking to a lawyer, not the police, for guidance:

> As is often the case, the driver at this "crucial stage" looked to the police for guidance. An attorney, not a police officer, is the appropriate source of legal advice. An attorney functions as an objective advisor who can explain alternative choices. We think the Minnesota Constitution protects the individual's right to consult counsel when confronted with this decision.

473 N.W.2d at 833-834. Such a right would prevent what occurs in Orange County where arresting officers in response to defendant's questions simply keep repeating the written implied consent warnings.

While drunk driving was recognized as a serious problem, the Minnesota Court felt that it did not justify canceling out the right to counsel. This was especially true in the absence of any evidence that such a right would would result in either

fewer defendants consenting to the test, or fewer convictions. The Court correctly questioned that "It is strange logic that concludes that there will be more drunk drivers on the road because a driver can consult counsel before taking a test rather than after taking it. 834 N.W.2d 834.

The Minnesota Supreme Court concluded by stating:

> Of all those rights embodied in our Bill of Rights, the two most fundamental are the right to counsel and the right to trial by jury. Without them, there can be no constitutional rights at all. Every citizen has learned at an early age that whenever one is in trouble, the first resort should be to contact one's attorney and seek advice. We thus repeat the age-old rule of law that was embodied in our state constitution: The defendant shall have the right to counsel.

473 N.W.2d at 835. An individual under arrest was thus held to have a right to "a reasonable opportunity to obtain legal advice before deciding whether to submit to chemical testing."

The Oregon Supreme Court in State v. Spencer, 750 P.2d 147 (Or. 1988) likewise found that the arrest of the person for DUI entitled him or her to consult with an attorney prior to breath testing.

> A person taken into formal custody by the police on a potentially criminal charge is confronted with the full legal power of the State, regardless of whether a formal charge has been filed. Where such custody is complete, neither the lack of a selected charge nor the possibility that the police will think better of the entire matter changes the fact that the arrested person is, at that moment, ensnared in a "criminal prosecution." The evanescent nature of the evidence the police seek to obtain may justify substantially limiting the time in which the person may exercise his or her Article 1, section 11, right, but it does

not justify doing away with it.

750 P.2d at 155-156. The Oregon Supreme Court therefore held that a person so arrested had a right to "a reasonable opportunity to obtain legal advice before deciding whether to submit to a breath test." Id at 156.

The same result should occur herein, where the right to counsel under Article One, section 16 of the Florida Constitution has been held to attach prior to the filing of formal charges. This is much earlier in the process than Sixth Amendment rights attach under the United States Constitution. That is permissible under Traylor, supra. While the federal government establishes the bare minimum below which the states cannot go (the floor), the Florida Constitution is still free to provide far greater rights to Florida citizens (and limitations on police actions) than provided under the federal constitution.

Consequently, federal case law, and state cases decided under claims of federal constitutional violations, neither control nor dictate this Court's rulings interpreting the Florida Constitution. That police conduct meets minimal federal constitutional requirements, does not mean the same conduct is constitutional or proper under the Florida Constitution.

In Phillips v. State 612 So.2d 557 (Fla. 1992) this Court analyzed when the right to counsel attached under Article One, section 16 as compared to the Sixth Amendment. This Court reinterated that the right to counsel under section 16 attached at "the earliest of the following points."

a) "when he or she is formally charged with a crime via the filing of an indictment or information;"

b) "as soon as feasible after custodial restraint;" and

c) "at first appearance."

In contrast, this Court found that under the Sixth Amendment, right to counsel only attached after the "initiation of formal judicial proceedings." The Florida Constitution provides greater right to counsel in this area than does the federal constitution, because section 16 rights "attach" far earlier.

In Phillips this Court acknowledged as much in footnote 2 thereof which stated:

> As explained in this opinion, the right to trial counsel under either constitution may attach at various points. Thus, in some cases the extent of the protection afforded by the Florida Constitution may be coextensive with that of the federal constitution, while in others it may be greater.

612 So.2d at 558. This would be consistent with this Court's federalism discussions and ruling in Traylor."

Interestingly, the Fifth District prior to Traylor had ruled that section 16 rights were no greater than those provided by the Sixth Amendment. Peoples v. State, 576 So.2d 783 (Fla. 5th DCA 1991). This Court had to correct that ruling in Peoples v. State, 612 So2d. 555 (Fla. 1992) Apparently not satisfied with that ruling, the Fifth District is now trying herein to accomplish the same result by simply defining away the events at the DUI Testing Center as not being "critical stages" including the interrogation of persons under arrest (as discussed infra). The trilogy of cases, Traylor, Phillips, and Peoples, however, leaves no doubt that under section 16, the right to counsel

attaches earlier than federal law including "as soon as feasible after custodial restraint."

It certainly would have been feasible for Mr. Burns to have consulted with an attorney at the DUI Breath Testing Center. The DUI Testing Center is a specially built DUI testing center designed to accomplish breath testing. Telephones certainly could have been installed so as to allow both the required twenty minute observations period and access to counsel. The lack of such telephones is the result of the Sheriff's Office construction planning, and not an inability to do so. With the modern technology now available, e.g. cellular telephones in police cars, etc., making a telephone available prior to testing is not unreasonable.

Additionally, prisoners are brought to this site instead of to booking as the result of a choice made by the police. Even this Court in Traylor said the right to counsel was feasible "by the time of booking." Police actions in dragging prisoners around to be tested, instead of booking them, cannot constitutionally mean that persons have lost their right to counsel, because it has now become "non-feasible."

The trial court herein, who regularly had Orange County Sheriff's Deputies before it, and was most knowledgeable about the situation in Orange County, implicitly found it was feasible. That ruling should not be disturbed on appeal.

Moreover, concerns about the dissipation of alcohol can be dealt with as it has been by the Supreme Courts of Oregon and Minnesota. Those court did not say the person had an absolute

right to speak with an attorney prior to testing, they ruled a person had a right to a "reasonable opportunity" to contact an attorney. Later decisions refined this rule to mean the opportunity to telephone an attorney within a reasonable time.

Thus, if a defendant calls her attorney, but reaches only an answering service and seeks to call no other, that satisfies constitutional requirements because she had been given ample assistance over a reasonable period of time - 30 minutes. State v. Larrett, 871 P.2d 1016 (Or.App. 1994) Similarly, while a defendant has a right to privacy in speaking with his attorney, that does not require out-of-sight of the officer who is performing the observation period prior to testing. State v. Penrod, 892 P.2d 729 (Or. App. 1995). Certainly, Florida courts are able to structure a similar system which allows an opportunity to consult with counsel, while not interfering with the proper administration of the breath test.

Notable, the police have all the time in the world to do their duties or protect themselves, e.g. make sure the vehicle is safely towed. But when it comes to protecting a defendant's rights, time suddenly is a factor. If tests an hour and a half after arrest are relevant and admissible, then certainly giving the defendant a few minutes to consult with an attorney would not unduly hamper police investigations (especially since they must wait 20 minutes prior to breath testing anyway).

Finally, a breath test sample differs from other physical evidence, such as hair samples or handwriting exemplars. With these a defendant can always reproduce another identical sample

for use and comparison by the defense, unlike a breath sample which can never be duplicated. This Court recently recognized this in Unruh v. State, 21 Fla. L. Weekly S104 (Fla. March 7, 1996) in which the Fifth District's decision that police had no duty to assist persons to obtain independent blood samples was reversed in part because by the time the person was released jail, the blood sample would be meaningless.

Likewise, the Fifth District's rationale herein that a defendant can defend himself "as he has always done" and thus does not need any attorney, ignores the significance of the breath sample, and conflicts with this Court's definition of "crucial stage" in Traylor. The issue is not whether a defendant can go back and defend himself, but whether this is a "crucial stage" entitling the defendant to an opportunity to consult with legal counsel.

The purpose of the attorney at this stage is not to help the suspect evade the law, but to assist him when confronted by the full weight of the criminal justice system. At that point, the suspect has just been arrested (frequently for the first time ever) and is now confronted with an array of police commands, requests, instructions and options. The attorney not only calms the person down and gets him to act in his best interest, but can also:

a) Inform him of his rights and assist in exercising those rights, e.g. obtaining an independent blood test;

b) Advise the person of factors which may affect the test or should be told to the police, e.g. burping, a disability;

c) Clarify common misconceptions, e.g. "you have to give more than one sample;"

d) Allay fears about the test and procedures, e.g. If you think the machine is inaccurate, take the test contrary to your natural reaction to refuse, and we will challenge it in court (especially important in light of Conahan v. Dept. Highway Safety, 619 So.2d 988 (Fla. 5th DCA 1993) that held a person who refuses cannot challenge the maintenance of the Intoxilyzer; and

e) Answer common driver license questions, especially in light of the immediate suspension under section 322.2615 which only a lawyer could understand with regard to commercial driver licenses.

Each of these are factors which can mislead persons into binding decisions which have serious legal consequences. This is when an attorney's advice and counsel is most needed in the DUI case. To hold person incommunicado in jail while testing them, is contrary to the fundamental concepts of American rights, open society, and the belief that persons should not be swept off the street by the government and kept away from contact with family, friends and lawyers.

Breath tests are the most important evidence in DUI cases. These results are not merely some evidence of the crime, but constitute an "element" thereof. If the Traylor definition of "crucial stage" as being that which may "significantly affect the outcome" of the case is to apply in all criminal cases and to all citizens in Florida, then this Court should rule there is a right to a reasonable opportunity to consult with counsel prior to being requested to take a breath test. There is not a DUI exception to Article one, section 16, and one must not be created by simply defining away significant police actions as not being a "crucial stage."

ISSUE II

WHETHER ANSWERING QUESTIONS AND THE TAKING, OR REFUSING, OF CERTAIN FIELD SOBRIETY TESTS CONSTITUTES INTERROGATION UNDER ARTICLE ONE, SECTION 9, FLORIDA CONSTITUTION AND IMPLICATES ARTICLE ONE, SECTION 16 THEREOF

This Court has ruled the nature of a suspect's answers during custodial interrogation does not affect his constitutional rights. Spivey v. State 529 So.2d 1088 at 1116 (Fla. 1988):

> The Miranda rights were established as a prophylactic rule to minimize the coercive atmosphere of custodial interrogation by law enforcement officers. The rule prohibits the use by the state of any statement, whether exculpatory or inculpatory, obtained in a custodial setting unless the procedural safeguards of Miranda are followed.

Yet, the Fifth District approved the post-arrest questioning of Mr. Burns herein on video, without Miranda warnings, if his answers were correct. This cannot and should not be the law.

It defies logic that the police can initiate interrogation, but the applicable constitutional protections vary from question to question based on whether the defendant answers correctly. Under this rationale, these protections would even vary between defendants. Police could ask identical questions to similarly situated defendants, and the applicable rights would differ based on the correctness of their answers.

Being arrested, Mr. Burns was undoubtedly in custody under Article one, sbection 9. The Fifth District conceded as much when it ruled "The suppression of Burns' answers is required only to the extent that Burns' answers were incriminating." Holding any answer suppressible, however, clearly acknowledges

a) Mr. Burns was in custody; b) the questioning constituted interrogation; and C) HE HAD A RIGHT TO SECTION 9 WARNINGS. Having conceded that, there is no legal basis upon which the Fifth District could hold one's right under Miranda change from question to question based on one's response. Yet, it did.

The purpose of videotaping this questioning is to obtain incriminating responses. Even the Fifth District made that finding in its March 31, 1996 Order:

> Burns answered questions with regarding his name, age, address and date of birth. However, the deputies did not make any notes of his responses and there was no indication the deputies were going to use the information for reports. Burns had already provided this information to the deputy prior to the videotaping. The State concedes that "it appears that the routine questions were not asked of [defendant] in order to complete the booking process." Although these questions are basic biographical questions which, when asked during the booking process have been held not designed to elicit an incriminating response, here the State's intent was different.
>
> * * *
>
> The trial court's apparent conclusion that the deputies were repeating the questions already asked and answered in order to elicit an incriminating response from Burns is supported by the circumstances surrounding the questioning." (emphasis added)

Yet, when confronted on rehearing with the fact that such questioning constituted interrogation under Article one, section 9 and a crucial stage under section 16, the Fifth District reissued its opinion on August 25, 1995. Instead of changing its ruling as it should, the Fifth District (despite no further facts being put in the record) deleted the above language and

suddenly found:

> The officer's focus was not on the content of Burn's answers, but rather was a legitimate effort to memorialize Burns' manner of speech.

This not only invades the trial court's fact-finding authority, it ignores the obvious intent of this police questioning.

Florida courts cannot go below the floor set by federal decisions. It is clear that any police statement, action or comment which is "reasonable likely to elicit an incriminating response" requires Miranda warnings. Rhode Island v. Innis 446 U. S. 291, 64 L.Ed.2d 297, 100 S.Ct. 1682 (1980)

> A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation. [see footnote 7]
>
> * * *
>
> [Footnote 7:] This is not to say that the intent of the police is irrelevant, for it may well have a bearing on whether the police should have known that their words or actions were reasonably likely to evoke an incriminating response. In particular, where a police practice is designed to elicit an incriminating response from the accused, it is unlikely that the practice will not also be one which the police should have known was reasonably likely to have this effect. (emphasis added)

64 L.Ed.2d at 308. Certainly questioning suspects on videotape (and requesting testimonial field sobriety tests) is "reasonably likely" to lead to incriminate responses.

The Fifth District also ignored Traylor v. State, supra, which defined interrogation under Section 9 to mean:

> Interrogation takes place for Section 9 purposes when a person is subjected to

> express questions or other words or actions, by a state agent, that a reasonable person would conclude are designed to lead to an incriminating response.

596 So.2d at 966. Mr. Burns thought the police tried to "trip him up" with these videotaped questions. (R 53) The trial court implicitly found the questions sought to elicit incriminating responses. That constitutes interrogation under Traylor.

This Court has not defined "interrogation" based on the nature of a defendant's answers. Neither have other courts done so, but which consistently look at the nature of the question, not the nature of the answer. The Fifth District's tortured logic regarding Allred and Diandrea is not consistent with this Court's intent, e.g. If correct responses were admissible, without warnings, then the alphabet in Contina v. State, 599 So.2d 728 (Fla. 2d DCA 1992) would have been admissible, since the defendant therein correctly said it up to the letter "p." If courts are to sort through a defendant's answers, like shoppers at a fruit stand, throwing away incriminating answers and keeping the correct ones, then logically those portions of the alphabet said correctly in Contina should have been admitted. This Court did not rule that way and rightfully so.

The decision below encourages the systematic, wholesale violation of constitutional rights. Even under the Fifth District decision, every time a police officer asks a person in custody to recite the alphabet and it is done incorrectly, that officer has violated the person's constitutional rights. When Mr. Burns was questioned on video, the officer did not know whether the response would be incriminating. The Fifth District

cannot authorize such custodial questioning, without warnings, under some theory that unconstitutionally obtained incriminating statements can later be suppressed, while correct answers can be kept. That invites constitutional violations, makes a sham out of the Section 9 rights, and invites further problems:

1) What happens under the doctrine of "fruit of the poisonous tree" since unconstitutional interrogation admittedly occurs anytime an incorrect response is given. In DUI cases, these improperly obtained answers will taint the arresting officer, State Attorneys, and courts. No one can guarantee the "content" of these testimonial responses, even if suppressed, will not affect the investigation or the legal proceedings.

2) The field sobriety tests herein are divided attention exercises requiring both testimonial responses and physical acts. There is no justice in allowing the officer to testify a suspect stumbled over his words, or hesitated as he spoke, when that may in fact be the result of the unconstitutional questioning, i.e. focusing on the content of the alphabet may cause hesitation or stumbling on the saying thereof. The physical parts of these tests are affected by the verbal parts.

There is no constitutionally acceptable option, as the Fifth District would adopt. This is not like rotten oranges, where the State can pick out the good and discard the unconstitutional. If police are going to initiate questioning or administer testimonial field sobriety tests to persons in custody they must read Section Nine, Miranda warnings. That is the standard set forth in Traylor which states:

> We hold that to ensure the voluntariness of confessions, the Self-Incrimination Clause of Article 1, Section 9, Florida Constitution, requires that prior to custodial interrogation in Florida suspects must be told that they have a right to remain silent, that anything they say will be used against them in court, that they have a right to a lawyer's help, and that if they cannot pay for a lawyer one will be appointed to help them.

596 So.2d at 966. District courts cannot authorize deviation from the rule that warnings be given prior to questioning.

Moreover, this constitutional infringement is not even needed. The police still have available to them similar evidence. They could have the suspects read the weather report instead of questioning them; or request the person to take non-testimonial field sobriety tests such as finger-to-nose. It is not necessary to throw out these constitutional safeguards.

The decision below quite simply circumvents basic Article One, Section 9 rights by creating a hybrid procedure in which incriminating answers are discarded, but correct answers are kept. It is scary the wrong that could be done by a rule that police can question people in custody and simply "throw back" those answers found violative of the constitution, while using the rest. Could one imagine the uproar in murder cases, if police could question a suspect without counsel or warning and yet use any answer that was not directly an admission of guilt. DUI cases are no different under the constitution and persons arrested therefore are entitled to the same rights.

ARTICLE ONE, SECTION 16

Since when did questioning a person in custody to elicit

incriminating answers not constitute a "crucial encounter or crucial stage of the prosecution." It does under this ruling. Yet, even the Fifth District concedes that incorrect answers during videotaped questioning requires suppression, and cannot be introduced unless proper warnings were given. If that is true, then the suspect must be entitled to ALL of the rights set forth in Miranda (and Traylor) including the right to counsel. It is inconsistent to hold that some questioning of arrestees at the DUI testing center must be suppressed under section 9, but that such questioning does not constitute a "crucial stage" under section 16.

Interrogation is a "crucial encounter." Peoples v. State, 612 So.2d 555 (Fla. 1992); State v. Douse 448 So.2d 1184 (Fla. 4th DCA 1984); Phillips v. State, 612 So.2d 557 (Fla. 1993) and Traylor v. State, supra. These cases make clear that ANY, ALL and EVERY initiation of custodial interrogation is a "crucial stage," violative of Section 16 absent a waiver of counsel.

This Court has consistently held that police questioning constitutes a "crucial encounter" under section 16 (regardless of a person's section 9 rights). In Peoples v. State, 612 So.2d 555 (Fla. 1992) a police informant initiated a telephone call to a suspect out on bail and taped it. Since the suspect was not "in custody", Section 9 did not apply. This Court still held, under section 16, that the telephone call and taping thereof:

> "constituted a crucial encounter between State and accused whereby the State knowingly circumvented the accused's right to have counsel present to act as a "medium" between himself and the State."

612 So.2d at 556. This was true even though the tape contained "little incriminating evidence." Peoples also expressly approved State v. Douse, 448 So.2d 1184 (Fla. 4th DCA 1984) wherein the court had held that once the right to counsel has attached under Section 16, "the police may not deliberately elicit incriminating statements from a defendant."

In Phillips v. State, 612 So.2d 557 (Fla. 1993) the Court made it even clearer that the questioning of a suspect constituted a "crucial stage or encounter" under Section 16. This Court expressly held that once Section 16 rights attached, the police may not initiate questioning on that charge in the absence of counsel." 612 So.2d at 559.

The instant case is not another State v. Foster case which involved booking questions. [562 So.2d 808 (Fla. 5th DCA 1990)] Since the "biographical questions" herein were admittedly not part of the booking procedure, but were intended to elicit incriminating responses, the questioning herein certainly is a crucial confrontation which the Fifth District cannot define away as mere "biographical questions." (A definition which tries to classify these as booking questions, which they are not.)

In Traylor this Court held that "an unrepresented defendant must be informed of his right to counsel and the consequences of a waiver before each "crucial confrontation." Rule 3.111, Fla. R. Crim. P. expressly requires any out-of-court waiver thereof to be in writing. None of that occurred herein. Mr. Burns was told none of his rights until after all relevant activities, at which point he immediately invoked his rights.

Moreover, the decision below ignores that testimonial field sobriety tests post-arrest also constitutes interrogation. In Allred v. State, 622 So.2d 984 (Fla. 1993), this Court held the recitation of the alphabet by one in custody constituted interrogation. This Court expressly disapproved therein of Contina v. State, 599 So.2d 788 (Fla. 2d DCA 1992) which had held it non-testimonial. It contradicts Allred to say requesting a person under arrest to perform these tests is not initiating interrogation - a "crucial encounter."

The other two field sobriety tests offered Mr. Burns at the testing center were likewise testimonial: 1) the walk and turn which requires testimonial evidence by counting one's step; and 2) the one legged stand which requires testimonial evidence by counting to thirty from 1001 to 1030.

Although Allred did not address whether "counting" constituted testimonial response, this Court summarized its Allred decision in State v. Taylor, 648 So.2d 701 (Fla. 1995) in footnote one thereof as follows:

> CF.Allred v. State, 622 So.2d 984 (Fla. 1993) (field sobriety tests requiring a testimonial response implicate the privilege against compelled self-incrimination under the Florida Constitution and require Miranda warnings.

This summary certainly seems to indicate Allred applies to all field sobriety tests requiring a testimonial response. Counting would also be "testimonial" under the definition in Pennsylvania v. Muniz, 496 U.S. 582, 110 S.Ct. 2638, 110 L.Ed.2d 528 (1990):

> [T]here are very few instances in which a verbal statement, either oral or written,

> will not convey information or assert facts. (cite omitted) Whenever a suspect is asked for a response requiring him to communicate an express or implied assertion of fact or belief, the suspect confronts the "trilema" of truth, falsity, or silence and hence the response (whether based on truth or falsity) contains a testimonial component.

110 S.Ct. at 2648. Whether saying the alphabet or counting on the one-leg stand, the same trilema would occur of answering correctly, incorrectly, or remaining silent. Therefore, field sobriety tests requiring counting are testimonial. The Fifth District's decision that no "crucial encounter" occurred at the testing center overlooks that Mr. Burns was requested to take these testimonial field sobriety tests which constitutes interrogation, and hence makes them a "crucial encounter." People, supra; Traylor, supra.

Instead, the Fifth District ruled that "Burn's refusal to perform physical, non-testimonial field sobriety tests, e.g. finger-to-nose, heel-to-toe, etc. on videotape at the testing center is admissible." The record is uncontroverted that Mr. Burns was never asked to take the "finger-to-nose" test or any other field sobriety test that did not require counting or recitation of the alphabet. Correctly, the Fifth district should have ruled on the record before it, and held that the request to take the testimonial field sobriety tests offered was inadmissible and constituted a "crucial stage or encounter" requiring the presence of an attorney.

Specifically, the record shows that prior to videotaping, the officer had told Mr. Burns which field sobriety test would be requested. (R 47-48) Thus, Mr. Burns knew the alphabet test

was one of the requested tests. Mr. Burns did not want to count or recite the alphabet on videotape. (R 49) Because Mr. Burns did not want to perform the verbal portions of these field sobriety tests, he declined to do them. (R 49) He was never offered an opportunity to do the physical parts of these tests without also performing the verbal portions thereof. (R 49)

It is basic, axiomatic constitutional law, that a person in custody can refuse to be interrogated and that said refusal cannot be used against him. State v. Roland, 573 So.2d 306 (Fla. 1991) This constitutional protection has not change, nor has there been any constitutional amendment exempting DUI suspects from the effect thereof. It is therefore impermissible to comment on Mr. Burn's refusal to take the alphabet test, which constitutes interrogation. Allred, supra. His response of "no" to the proffered tests is clearly sufficient to invoke his constitutional rights.

This is significant, because the arresting officer asked Mr. Burns a broad question encompassing several tests, i.e. Will you take the field sobriety tests. Mr. Burns properly invoked his right not to be interrogated in response to this general question which included interrogation in the form of reciting the alphabet. The burden was on the officer to clarify any ambiguity or to rephrase the question in a more specific manner. Owen v. State, 560 So.2d 207 (Fla. 1990) Instead, she chose not to ask about each field sobriety test being offered nor did she ever offer these tests without the testimonial components thereof. (R 49) That was her choice. It is unfair to now

allow the introduction of Mr. Burns' constitutionally protected refusal to be interrogated as proof of guilty knowledge.

Consequently, the Fifth District's discussion below of Occhicone v. State, 570 So.2d 902 (Fla. 1990) is meaningless. Only a hand swab test was requested therein. If that defendant instead had been asked in one question to both "answer some questions and give us a hand swab," the case might have some relevance. The Fifth District cited no authority which allows comment on a negative response by a defendant to a broad question which includes requests for both constitutionally protected interrogation and non-protected physical requests.

There is no exception for DUI cases in Florida. When the police undertook to interrogate Mr. Burns at the testing center (through direct questioning and testimonial field sobriety tests) that constituted a "crucial stage or encounter" under Article one, Section 16 of the Florida Constitution which entitled him to the right to consult with an attorney and to be informed of those rights. When the overlooked facts and law are considered, the only logical and constitutional decision is that above direct questioning and request for testimonial field sobriety tests constituted a "crucial encounter" requiring compliance with the Section 16 mandates set forth in Traylor including access to an attorney.

ISSUE III

WHETHER MR. BURNS HAD CONSTITUTIONAL RIGHTS AT ROADSIDE UNDER ARTICLE 1, SECTION 9 OF THE FLORIDA CONSTITUTION

Even the Supreme Court in Berkemer v. McCarty, 468 U.S. 420 (1984) would not adopt a per se rule exempting the reading of Miranda warnings during traffic stops:

> Admittedly, our adherence to the doctrine just recounted will will mean that the police and lower courts will continue occassionally to have difficulty deciding exactly when a suspect has been taken into custody. Either a rule that Miranda applies to all traffic stops, or a rule that the suspect need not be advised of his rights until he is formally placed under arrest would provide a clearer, more easily administered line. However, each of these two alternatives has drawbacks that make it unacceptable. (Emphasis added).

By its decision, the Supreme Court thus left to trial courts the determination of custody based on the facts of the individual case, and not merely through the application of "per se" rules.

Yet the Fifth District herein did what the Supreme Court dared not do. The Fifth District effectively created an arbitrary standard under Article one, section 9 by ruling:

> Here, there are no factors which would take this case outside the holding of Berkemer. The trial court's finding that Burns reasonably believed his freedom of action was "curtailed to a degree associated with actual arrest" was erroneous as a matter of law. (emphasis added)

Since custody is a factual issue, persons and courts may differ as to their conclusion. To say the trial court below erred "as a matter of law" is nothing more than the adoption of a "per se rule." Instead of considering the totality of the factual situation as Berkemer envisioned, the Fifth District would have

trial judge look only to see if the Berkemer factors were present. If those factors are present, then "as a matter of law" the trial judge is required to rule thereis no custody, even where the arresting officer lacks candor, or there are factors not present in Berkemer, e.g. a request to leave.

That ruling is certainly not consistent with Traylor v. State 596 So.2d 957 (Fla. 1992), wherein this Court ruled:

> A person is in custody for Section 9 purposes if a reasonable person placed in that same position would believe that his or her freedom of action was curtailed to a degree associated with actual arrest.

596 So.2d at 966. See also Drake v. State, 441 So.2d 1079 (Fla. 1983) which instructed trial courts to determine whether a "reasonable person would have believed that his freedom of action was restricted in a significant way." 441 So.2d at 1081. Both of these cases focus on the factual basis of a reasonable person's beliefs and not upon some bright line test that constitutes custody "as a matter of law."

Custody has always been a factual determination for the trial court based on the "totality of all the surrounding circumstances." B.S. v. State, 548 So.2d 838 (Fla. 3d DCA 1989) The facts below being in dispute, it was the trial court's duty to resolve conflicting facts. Boykin v. State, 309 So.2d 211 (Fla. 1st DCA 1975). An appellate court should not substitute its judgment for that of the trial court, but should defer to the trial court's authority as fact finder. Medina v. State, 566 So.2d 1046 (Fla. 1985); Wasco v. State, 505 So.2d 1314 (Fla. 1987)

The Fifth District's statement that there are no factors outside Berkemer is itself a factual conclusion. It overlooks that reasonable persons' beliefs can vary based on whether they are being stopped by Officer Friendly at noon in downtown Orlando, or at night by Officer Hostile on a lonely, deserted country road. In different settings, similar police actions may result in quite different responses and beliefs by a reasonable person. That is one reason, no "per se" rule is possible.

The factor most associated with arrest is the loss of freedom to leave and do as one wishes. Yet, the Fifth District summarily dismisses that Mr. Burns was repeatedly told from the moment of the stop he could not leave, by stating:

> Additionally, Burn's testimony to the effect that prior to the roadside tests, he requested to be allowed to go because he was just around the corner from his residence is not determinative. The deputy could properly have refused the request regardless of whether Burns was subject to full custodial arrest or a temporary detention.

This has nothing to do with a reasonable person's beliefs. The court did not explain why denying a request to leave cannot be determinative of a reasonable person's belief, if the trial court so finds. This impermissible shifts attention from the reasonable person's beliefs as required in Traylor and instead focuses on the officer's legal right to detain Mr. Burns.

Moreover, the court's rationale conflicts with this Court's decision in Roman v. State 475 So.2d 1228 (Fla. 1985):

> A policeman's unarticulated plan [to arrest] has no bearing on the question of whether a suspect was "in custody" at a particular time; the only relevant inquiry is how a

> reasonable man in the suspect's position would have understood his situation.

475 So.2d at 1231. If the "unarticulated plan" to arrest has no bearing on a suspect's beliefs, then the Fifth District erred in holding an unarticulated basus to detain somehow has a bearing on a suspect's belief. It is simply illogical to say one has a bearing, and the other does not, when neither was articulated to Mr. Burns. The repeated denial of Mr. Burn's request to leave would certainly give rise in reasonable persons to a belief that they were not free to leave, i.e. under arrest.

Moreover, it defies logic to say that a "reasonable person" standing in the flashing light of a police car, with an armed officer by his side, and whose repeated requests to leave are denied, could never believe he was in custody. Yet, that is what the Fifth District necessarily found to overrule the trial court's decision herein "as a matter of law", when the trial court's findings came before it clothed with a presumption of correctness. Bonilla v. State, 579 So.2d 802 (Fla. 5th DCA 1991). If Mr. Burns under those circumstances could have felt his freedom of action was curtailed as he testified, then the trial court's decision should have been upheld. Traylor, supra. The range of human experience is such, that standing alone on the side of a desolate street may be more coercive, mor threatening - more "police dominated" - than being in a police station, i.e. no witnesses, officer's word against mine, no one to help me. The Rodney King beatings and verdicts, the controversial killing of citizens by police, the arrest of police officers for rape and drug dealing, are all part of our

societal conscience and clearly must be considered in determining what a reasonable person would think.

The Fifth District also impermissible shifted the inquiry away from what a reasonable person believes as Traylor requires, to a standard based on the police view of the stop, e.g. categorizing this as a "routine traffic stop" emphasizes the police view rather than that of the driver.

Yet, differences in the time, location, and conditions, as well as the officer's mannerisms, statements, gestures, commands and behavior precludes any general rule under Section 9 that "ordinary DUI stops" are automatically non-custodial. It is the trial court's fact finding duty to determine from the totality of the circumstances what a reasonable person would have preceived to be his situation. Caso v. State, 524 So.2d 422 (Fla. 1988); B.S. v. State, supra.

Moreover, it is not the function of the Fifth District to determine the credibility of the witnesses. See Johnson v. State, 27 So.2d 276 at 282 (Fla. 1946) wherein this Court on appeal from a suppression order ruled:

> The [trial] court had the benefit of seeing the witness face to face and was in a better position then are we to judge who was and who was not telling the truth and it was the [trial] court's province to determine this ....

See also Perez v. State, 536 So.2d 359 (Fla. 3d DCA 1988); State v. Bravo, 565 So.2d 857 (Fla. 2d DCA 1990). The trial court herein may simply have believed Mr. Burns' testimony, but not that of the officer, and given the appropriate weight to each.

The arresting officer in this case lied at the suppression herein. On direct examination, she testified falsely that she had never told Mr. Burns he couldn't leave the scene:

> Q. Did you ever tell the defendant that he was not free to leave?
>
> A. No, I didn't.

(R 10) After repeating this false assertion on cross-examination, the witness was confronted by her own sworn arrest affidavit which stated:

> The defendant asked me several times just to let him go because he was only around the corner from his house. I denied the request.

(R 18-19) Only when thus confronted by her own sworn statement, did the officer finally admit she had told Mr. Burns he could not leave the scene, and that she had done so as soon as he got out of the car. (R 19)

In contrast, Mr. Burns testifed he felt that he was not free to terminate this encounter with the police and simply leave. (R 45) He provided detailed evidence about the circumstances and the officer, including her instructions to stand at a certain location and her repeated commands to keep his hands out of his pockets. (R 40) Further, Mr. Burns testified that he did not think these were simply requests that he was free to ignore (R 40); that he felt if he attempted to leave the officer would stop him (R 40); and about other factors which made him feel in custody.

The trial court was not required to accept the testimony of the police officer who gave false and inaccurate testimony. It

could simply have chosen to believe Mr. Burns' truthful statements. Under such cases as Wasco v. State, 505 So.2d 1314 (Fla. 1987) and Perez v. State, supra, determining the credibility of witness is the province of trial courts. The trial court below could simply have not chosen to believe the officer's testimony upon which the Fifth District now bases its finding this was a "routine stop."

Moreover, the Fifth District found that "at the time the deputy started the field sobriety tests, the deputy believed she had probable cause to arrest Burns for DUI," which she could have done. State v. Harris, 281 So.2d 405 (Fla. 4th DCA 1973) Since the deputy had probable cause to arrest, the delay in doing so was obviously to obtain further evidence and interrogation prior to formally arresting him. This Court's decision therefore overlooks that Florida courts have recognized a "de facto arrest" standard applicable to police interrogation. In State v. J.V. 623 So.2d 1232 (Fla. 3d DCA 1993) the police had probable cause to arrest the person, but delayed formal arrest and questioned the suspect without proper warnings.

In suppressing the resulting statements, the Third District Court properly found:

> Plainly, when, as here, law enforcement officers effect a de facto arrest of a suspect at a suspect's home and thereafter interrogate the suspect at that location, they are not exempt from warning the suspect of his/her Miranda rights prior to interrogation merely because they delayed a formal arrest of the suspect until after the questioning was completed, especially where they had ample probable cause to arrest before any questioning began and would not have allowed the suspect to leave during

> questioning in any event. See Orozco v. Texas, 394 U.S. 924, 89 S.Ct. 1095, 22 L.Ed.2d 311 (1969).

623 So.2d at 1234. That is exactly what happened herein. The arresting officer clearly DELAYED her arrest of Mr. Burns so as to interrogate him by administering testimonial field sobriety tests, e.g. alphabet. It was to obtain this additional interrogation that the arrest was delayed, because once completed, Mr. Burns was arrested.

Under the Florida "de facto arrest" doctrine, the interrogation without warnings of a defendant after probable cause to arrest exists violates constitutional rights. Florida Courts, of course, can set higher standards then those required by Federal constitutional decisions, but even the Berkemer Court condemned such delay of the formal arrest

> [Defendant] contends that to "exempt" traffic stops from the coverage of Miranda will open the way to widespread abuse. Policmen will simply delay formally arresting detained motorists, and will subject them to sustained and intimidating interrogation at the scene of their intitial detention.
>
> * * *
>
> The net result, [defendant] contends will be a serious threat to the rights that the Miranda doctrine is designed to protect.
>
> We are confident that the state of affairs projected by [defendant] will not come to pass.

82 L.Ed.2d at 335. But it has, if this opinion is affirmed.

The Florida Constitution can give individuals greater rights than those provided by the federal constitution. Traylor v. State, supra. While federal courts may set the floor, it is

this Court which sets the ceiling. id.

Berkemer v. McCarty was decided in 1984. Alcohol related behavior which would have resulted in a ride home then, means arrest today. This is especially true since the enactment of the 0.08% standard. No longer does one have to be so called "knee-walking, commode-hugging drunk" to get arrested. Arrests are now occurring on the smell of alcoholic beverages alone. The undersigned in fact represented a person arrested for DUI after one beer drank several hours before, who blew a 0.008 - one tenth the legal limit.

The arrest of alleged DUI offenders is no longer an isolated, coincidental event. In Orange County, there is a DUI squad, a separate DUI testing center, and periodically coordinated efforts between the law enforcement departments to apprehend DUI suspects. Officers with video camaras stake out bars, follow potential DUI suspects for blocks hoping to videotape a driving pattern sufficient to stop them, challenge them with statements such as "you've been drinking tonight" or otherwise try to get them to incriminate themselves, and finally administer a battery of field sobriety tests before "suddenly concluding" the person is DUI. Even herein, the officer admitted that within seconds this become a DUI investigation. (R 33) She never even issued a citation for the "infraction" for which she purportedly stopped Mr. Burns. (R 47)

This is far different world than Berkemer where the arrest for DUI was apparently incidently to the stop for a traffic infraction. Once the officer begins making specific inquiries

and initiates field sobriety tests, the nature of the stop changes. The person then is no longer the subject of a mere traffic infraction, but has become the "focus" of a criminal investigation. Historically, the "focusing" of a criminal investigation on a particular person constitutes custody. Martin v. State, 557 So.2d 622 (Fla. 4th DCA 1990); Jenkins v. State, 533 So.2d 297 (Fla. 1st DCA 1988), rev. den. 542 So.2d 1334.

It would be unreasonable to think a person who becomes the focus of a DUI investigation, with its demand to perform not one, but a battery of field sobriety tests, would still believe his detention was temporary and that he did not face serious consequences. In the 12 years since Berkemer, the increased awareness and enhancement of DUI penalties, police crack-downs, enforcement and educational efforts certainly would make a reasonable person believe upon becoming the subject of a DUI investigation that the possibility of being let go has been greatly reduced, ESPECIALLY in the absence of total compliance with the officer's requests. Consequently, the DUI investigation at roadside is more serious, more intimidating and more police dominated then ever before.

Persons accused of DUI simply want the same constitutional rights that murderers, thiefs and robbers now have. This Court did not allow the police to go to a suspect they believed was a murderer, and question that person without warnings. Traylor, supra. Yet, everyday that process is being repeated with DUI suspects.

Constitutional rights dribble away from us, by the smallest degree and for the best of purposes. This Court should not allow that to happen. When the officer's attention at roadside turns to the DUI offense, be it by questioning or administration of testimonial field sobriety tests, Article one, Section nine rights should be held to attach so as to require the giving of Miranda/Traylor warnings.

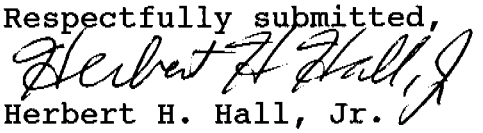
CONCLUSION

This case addresses whether the Florida Constitution means what it says for everyone accused of a crime, even unpopular ones. There is no DUI exception to our Constitution, but way too often the logic of DUI appellate cases begins with the "blood on the highway" argument. Drunk driving is a serious social and legal problem. As the Oregon Supreme Court ruled, however, that does not justify throwing away constitutional protections. Bad situations make bad laws. And trying to solve social problems by limiting constitutional rights too often results in neither solving the problem nor preserving our rights. Rights are not taken from us in one swoop, but through an exception here and a change there. Even if well intentioned, we and our children end up with fewer rights and more government intrusion in our lives.

Breath testing is undoubtedly a "crucial stage" in a DUI prosecution. Both Oregon and Minnesota have shown the societal interest in obtaining breath tests can be accomodated, while preserving the right to counsel. Certainly Florida courts are equally able to fashion a procedure to provide a "reasonable opportunity" for Floridians to consult with an attorney under Article one, section 16 in DUI cases.

Similarly, allowing officers to delay arresting persons at roadside so as to interrogate them further, and allowing post-arrest questioning based on whether the answers are correct, violates the Florida Constitution and must be reversed.

Respectfully submitted,



Herbert H. Hall, Jr.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by mail upon Kristen L. Davenport, Assistant Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118 this 18th day of March, 1996.

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