OA 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

REPLY BRIEF ON THE MERITS

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PREFATORY STATEMENT

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

Reference to testimony shall be by reference to the record on appeal before the Fifth District which shall be by the letter "R" followed by the page number of the record at which the material immediately preceding appeared in the record.

Reference to Respondent's Brief on the Merits shall be by the term "EBB" followed by the page number of the brief at which the material immediately preceding appeared in said brief.

AUTHORITIES CITED

SUMMARY OF ARGUMENT

ISSUE I: Trial courts should decide custody on the totality of the facts, not simply adopt a per se rule that no custody exits, "as a matter of law," if the factors in Berkemer v. McCarty 468 U.S. 420 (1984) are present. The trial court below could reject the officer's testimony for lack of honesty, leaving insufficient evidence to meet the State's burden. The State did not show how this was error as a "matter of law."

The State also never rebutted Mr. Burns was under de facto arrest at roadside, so as to require suppression of those tests.

ISSUE II: The State tries to avoid the fact that Mr. Burns was interrogated in custody by testimonial field sobriety tests and videotaped questions. The State errs in saying these tests have no testimonial component and in relying on cases which deal strictly with physical evidence, e.g. blood tests.

The State's position that "correct answers" from custodial interrogation can be used is contrary to the law and encourages police to violate section 9 rights since it benefits them.

ISSUE III: No evidence is more critical than the breath test results, an actual element of the offense. Later attacks, simply do not substitute for attorney consultation at the time of its administration. It was feasible as the trial court found, and the State failed to demonstrate that it was not.

The State argues inconsistent positions in claiming DUI suspects require special procedures, but that DUI suspects should not be accommodated by allowing them "an opportunity" to consult an attorney as has been done in other states.

ISSUE I

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

The State minimizes the trail court's role as fact-finder to convince the Court to adopt in effect a per se rule exempting roadside stops from Article one, section 9. Yet, even Berkemer rejected a bright line standard and left to trial courts the factual determination of custody. A reasonable belief about custody can change radically based on situations and officers involved, e.g. a stop by Officer Friendly at noon downtown, versus one by Officer Hostile at night on a lonely country road.

Officers can say similar words, but convey quite different statements through their attitude and demeanor - both at roadside and at suppression hearings. Yet, the State argues that even egregious conduct like Deputy Almadova lying at the hearing has "little relevance." (AB 13) Both the State and Fifth District, however, used key facts coming only from her testimony as proof that no custody occurred, e.g. Mr. Burns was pulled over "in plain view of passing vehicles," the stop took only 10 minutes and certain acts were "standard policy." (AB 2)

The trial court could properly consider Deputy Almadova's credibility and was not required to blindly accept her testimony as fact. Witness credibility and the weight given such testimony is exclusively its province. State v. Polak, 598 So.2d 150 (Fla. 1992) The trial court below could properly reject all of Deputy Almadova's testimony for lack of honesty.

The State had the burden of proving the roadside evidence

was lawfully obtained. The trial court's ruling that the State did not meet its burden is presumed correct. State v. Lagree, 595 So.2d 1029 (Fla. 1st DCA 1992) On appeal, the evidence and inferences are viewed in the light most favorable to sustaining the trial court's ruling. Medina v. State, 566 So.2d 1046 (Fla. 1985). Without consideration of evidence from Deputy Almadova who was not credible, the remaining facts do not establish the trial court erred in its ruling, much less that said ruling was "as a matter of law" wrong.

The State never addressed on what legal basis the Fifth District could rule the trial court erred as "a matter of law" on the custody issue. Even if it would have reached a different conclusion, custody is a factual issue. How can a trial court be held to have ruled incorrectly as a matter of law on a factual issue? This result could only occur if the Fifth District applied a per se standard, i.e. Berkemer factors were present, hence there was no custody (despite other facts). This is contrary to Berkemer, and violates established principles:

a) Custody is based on the "totality of all the surrounding circumstances." B.S. v. State, 548 So.2d 838 (Fla. 3d DCA 1989) Are trial courts required to ignore other facts and rule no custody "as a matter of law," just because Berkemer factors are allegedly present. This would create the traffic stop exception to Miranda which Berkemer would not authorize.

b) Moreover, this "as a matter of law" ruling ignores that custody is from the perspective of a reasonable person. Traylor v. State, 596 So.2d 957 (Fla. 1992). Focusing on the standard

nature of a stop makes the police perspective paramount. Calling this an "ordinary traffic stop" does not make it non-custodial, anymore than the customary practices of the police can make something legal. State v. Daniel, 20 Fla.L.Weekly S497 (Fla. 1995) Determining "reasonable belief" is a trial court's duty.

The State negates the impact of the officer's denial of Mr. Burn's repeated requests to leave by saying the issue is not whether he is free to leave. Yet, the primary effect of arrest is a limiting of one's freedom of movement. Drawing weapons, handcuffing, and incarceration are only variations of such restraint. A person expressly told he cannot leave, may very well feel subject to restraint equal to arrest.

Moreover, Mr. Burns testified about other police orders at roadside, including "stand in one place" and "keep hands out of pockets." (R 40) If these are sufficient to change consensual encounters into Terry stops, the cumulative effect could certainly lead reasonable persons to believe their freedom of action was curtailed to a degree associated with arrest.

Significantly, the State never addresses or rebuts that Mr. Burns was under de facto arrest at roadside. The Deputy believed she had probable cause to arrest before the field sobriety tests. The State never disputes that formal arrest was delayed to give these tests. That is de facto arrest requiring suppression. State v. J.V., 623 So.2d 1232 (Fla. 3d DCA 1993)

The State also misconstrues Mr. Burn's argument in saying:

> Petitioners' contention that once they became "the focus of a criminal investigation" they were rendered in custody

> is not supported by Florida law. To the extent the cases petitioner cites apply this "focus" test, these cases are no longer good law.

(AB 18-19) It is not the "focusing" of the investigation which, in and of itself, results in custody. It is that such a shift in "focus" to the more serious DUI charge affects the person's belief on whether the detention will be temporary and release imminent. Under such circumstances, a person would reasonable believe the possibility of being let go is greatly reduced, ESPECIALLY without total compliance with the officer's request. This factor does affect one's appraisal of the situation.

Finally, the State creates a strawman, which it seeks to defeat by claiming "there is no Florida precedent indicating a break from federal law in this area is either required or prudent." (AB 21) This argument is made to convince the Court that to uphold the trial court's order, it must reject the Berkemer/Bruder line of cases. It does not. No break from federal law is required unless one believes, as the State does, that the presence of Berkemer factors always requires a finding of non-custody. But since custody is a factual issue for trial court determination, the trial court herein could properly find custody on the facts of this case and still be in agreement with the reasonable person standard in Berkemer.

This Court should make it clear that trial courts are the fact finders, and are not required to apply some per se exception to Article one, section 9 in DUI cases. Custody should be decided on the totality of the facts, not simply on whether Berkemer type factors are present.

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

Why not allow police in high crime areas to arbitrarily detain and question anyone, or even beat suspects. The police will learn information, and we can always suppress incriminating responses later. Such suggestions are clearly repugnant.

The State, however, advocates this same principle regarding testimonial field sobriety tests and videotaped questioning of DUI suspects. While conceding incorrect answers must be suppressed, the State argues correct answers do not. Implicit in that concession, however, is that these suspects have rights under Section 9, and that their rights are admittedly violated when incorrect responses occur. Since the officer does not know the answer will be correct when he asks the question, this obviously will result in rights violations.

The State says violations can be rectified by suppressing incorrect responses, while still allowing use of correct responses. This is legally equivalent to the scenarios above and directly contradicts the State's own evaluation of the law:

> A suspect has an absolute constitutional right to remain silent. Such a right can only be protected through the presence of an attorney during questioning by any State agent, and once the right has been lost there are no post-encounter challenges which can repair the damage. (emphasis added)

(AB 47-48) How can the State now argue suppression of incorrect answers is sufficient to permit these police practices which foreseeably will violate the right to counsel. The State wants

to interrogate DUI suspects without warnings, and still use part or all of the suspect's answers. If allowed, that encourages further violations because the State benefits. Suppression should discourage violations, not merely clean up afterwards.

The absurdity to which this leads is shown by the argument that Mr. Burns' refusal to be interrogated via the alphabet test is admissible because section 9 violations could have been "dealt with by suppressing any testimonial response." (AB 33) In other words, if Mr. Burns had not refused, the tape's audio portion could have been suppressed so the jury could see his demeanor while answering the questions he had an absolute right not to answer. That he exercised his rights, instead of answering and later seeking suppression of verbal parts, is now asserted by the State as proof of guilty knowledge - incredible.

The State also errs in asserting the field sobriety tests offered Mr. Burns were strictly physical demonstrations in which "no communicative response was required." (AB 22) Testimonial responses were essential parts of each test, e.g. What would the alphabet test be without them? The State's discussion of cases involving strictly physical evidence, e.g. blood tests in Schmerber v. California, 384 U.S. 757 (1966), is irrelevant. The tests herein contain testimonial responses, the content of which influences the verdict. This Court properly held such tests are interrogation. Allred v. State, 622 So.2d 984 (Fla. 1993)

To distinguish Allred the State argues interrogation occurs only if requested recitations are "out of the ordinary sequence" (not as herein where the request was for the entire alphabet).

Yet, the "out of ordinary sequence" in Allred was not a complex request to say every third letter or recite it backward, but simply to start at letter "c" and recite in proper order until letter "w." This hardly requires the "mental gymnastics" the State now argues distinguishes Allred.

It also makes no common sense that a request for recitation from "C" to the end constitutes interrogation, but from "A" to the end would not. Certainly a letter or two difference in starting or ending should not determine section 9 rights.

Moreover, the State does not apply this logic to other field sobriety tests. The number system has no beginning or end. Thus, any request to count refers only to a portion thereof, and would be "out of its ordinary sequence" requiring the "mental gymnastics" the State said made the alphabet test interrogation.

Yet, the State abandons this argument with regard to counting which suddenly takes "virtually no thought to recite." (AB 27) This is merely a rehashing of the old alphabet argument - everyone knows it - which this Court rejected in reversing Contina v. State, 599 So.2d 728 242 (Fla. 2d DCA 1992).

The State in footnote 14 errs in stating that reading a weather report is "much more likely to elicit testimonially incriminating responses." First, in Allred, this Court emphasized that it is "content" which is at issue. Testimonial responses occur when suspects provide the "content" during interrogation. Reading a document permissibly displays the manner of speech, because the suspect provides no content.

Moreover, the State's argument with regard to the

videotaped questions is circuitous, i.e. Allred held routine biographical questions were not interrogation when asked for non-incriminating use at booking. Based on that ruling, the State now argues the questions herein are admissible, even though admittedly not for booking and intended to elicit incriminating responses. This is nothing more than "there is an exception to the rule; since there is an exception, this should be allowed even though it does not fit within the exception."

Finally, the State glosses over these section 9 violations by trying to define them away. It states that verbal responses on field sobriety tests and videotaped questioning are not "testimonial statements at all" since content is irrelevant. (AB 29) Despite having argued content errors for years, the State suddenly claims no interest in the content of answers to police questions which were asked to obtain incriminating responses.

The State is simply trying to circumvent Spivey v. State, 529 So.2d 1088 (Fla. 1988) which prohibited State use of "any statement, whether exculpatory or inculpatory, ... unless the procedural safeguards of Miranda are followed." The State is now trying to get through the back door, that which has been prohibited: Use of evidence from improper interrogation of persons in custody. Calling these non-testimonial responses does not change their true nature, or what occurred. It is simplicity that makes section 9 rights easily enforced. The courts should not now eviscerate section 9 by injecting this issue. Only by suppression all statements, thereby denying the State any of benefit, can future violations be prevented.

ISSUE III

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

The State blurs the Traylor ruling by arguing as if this Court used the term "at" instead of "by" in footnote 13 thereof:

> "As a general rule, assignment of counsel is feasible by the time of booking."

The term "by" means "not later than." Websters New Collegiate Dictionary. The rule is thus, not that it becomes feasible only "at" booking as the State argues, but that it is feasible "no later than" booking. This is a factual issue for trial courts.

The trial court herein properly found it feasible for Mr. Burns to contact an attorney at the Breath Testing Center. The Center was specially designed and constructed for DUI testing by the Orange County Sheriff's Office. (R 26, 47) There were telephones available. (R 25) Mr. Burns sat for a period of time at the Testing Center when he could have called an attorney, if allowed. (R 52) Moreover, in route the officer could have had police dispatch call an attorney, in the same way as they contact wrecker services to tow defendants' vehicles. (R 24)

The State asserts Mr. Burns' position reduces when counsel attaches to only two situations, i.e. upon arrest or upon filing of charges, and that arraignment thus would never trigger section 16 rights. (AB 37) That is neither correct nor logical:

a) Charges are filed by indictment (grand jury), information (state attorney) or citation (officer). Drivers in accidents are commonly not charged until blood test results return. When later charged by citation for DUI and summoned to

appear, they attend arraignment prior to arrest or the filing of any information or indictment (contrary to the State's claims).

b) The State changes "as soon as feasible after custodial restraint" into simply "at booking." Yet, every person given a breath test has been arrested, and will be booked thereafter. For this argument, there is no logical difference between right to counsel being feasible at "booking" as State asserts, or prior thereto as Mr. Burns asserts, since both occur prior to any arraignment. Both positions have the same effect on whether arraignment triggers section 16 rights. This is a non-issue.

Similarly, the State argues inconsistent positions regarding section 16 rights in DUI cases. First it argues this "is a case where the nature of the offense itself necessitates a minor delay in booking [and right to counsel] in order to allow the police to capture evidence of the crime." (AB 38) Thus, the State wants permission for police to delay booking in order to test DUI defendants (unlike other criminal who are immediately booked). Yet, when Mr. Burns requests a "reasonable opportunity" to contact an attorney, the State suddenly claims DUI defendants should be treated like other suspects and not accommodated because they should not have their "own unique constitution." (AB 40)

Mr. Burns would like nothing more then to be treated like any other criminal defendant and not be interrogated without warnings or attorney. Or be dragged around incommunicado to be tested before they will book him in jail. No court would allow the police for one minute to keep an arrested murder suspect

away from an attorney in order to drag him around for interrogation prior to booking him. Why should DUI defendants be treated differently.

The State would have this Court treat DUI defendants differently by holding section 16 rights do not attach, even where the police choose to take the suspect to a testing center instead of immediately booking him. While the State argues the "practicalities of the situation" with regard to obtaining evidence (AB39) and uses phrases such as "feasibility," its real argument is that the DUI defendant's right to an attorney should be held in abeyance until police have gathered this incriminating evidence. "Feasibility" is not the issue as demonstrated by the police having all the time necessary to do their paperwork and protect themselves, e.g. towing a suspect's vehicle. Yet, when defendants ask for time to make a call, suddenly these tests "must be performed as soon as possible" in order to preserve evidence.

Societal interests may limit this Court's ability to rule there is an absolute right to actually speak to an attorney prior to any breath test. That does not mean the choice is between no rights and full rights as the State argues. Courts in Minnesota and Oregon have devised practical compromises which allow both for an "opportunity" to speak with an attorney while still allowing for the timely administration of breath tests. Friedman v. Commissioner of Public Safety, 473 N.W.2d 828 (Minn. 1991); State v. Spencer, 750 P.2d 147 (Or. 1988)

The State underestimates the trial courts in Florida. They

certainly are up to the task of determining what constitutes a "reasonable opportunity" to consult with counsel. In addition to regular suppression issues, in DUI cases trial courts are now making such determinations as whether DUI technicians have "substantially complied" with the DUI maintenance requirements and whether the test were administered in "substantial compliance" with FDLE Rules. Yet, the State has never argued that absolute, total compliance with the FDLE breath testing rules should be the standard because "substantial compliance" would make it tough on the courts. Again, when the State benefits, it is no problem, but when defendants want similar consideration, then it becomes a burden.

The State also argues this is not a "crucial stage" even though this Court defined that to mean in Traylor:

> "crucial stage" is any stage that may significantly effect the outcome of the proceeding.

596 So.2d at 968. The State seeks to complicate the simplicity of this ruling and raises the specter that any encounter between a state official and an arrested citizen would necessitate presence of counsel. (AB 43) Forgotten in its discussion of fingerprints and blood draw for DNA purposes, is that such factors never change. Counsel is not needed because whether next week or next year, a defendant can always provide another sample for defense testing and use at trial. As noted in State v. Unruh, 21 Fla. L. Weekly S104 (Fla. 1996), the same is not true of breath alcohol readings which can never be duplicated.

The State would define "crucial stage" in terms of whether

an attorney was needed to protect rights. (AB 44-45) BUT WHO MAKES THAT DETERMINATION? Moreover, how does the officer know when he starts these procedures whether an attorney is needed under the facts of that specific case. For instance, a 20 minute observation prior to testing has always been required to detect a person regurgitating alcohol into his mouth which would effect the test. Yet, DUI technicians don't ask the subject if he burped. Few clients will remember when they later see their attorney whether they in fact were burping that night. Like a line-up, this is an example of where an attorney will detect hidden problems which can significantly affect the outcome.

Moreover, an attorney can consult and advise the person about the breath test. In light of publicized concerns about breath tests (especially in Orange County), defendants do have questions that need answers. As the Minnesota Supreme found, the person to answer those questions is an attorney, not the police officer. Friedman v. Commissioner, supra.

Mr. Burns refused the breath test. The events surrounding that refusal are not readily available. What did the officer say or imply off-camera, before or after the videotaped request? Even if consulting an attorney does not always effect the test results, it certainly impacts the decision making process and, in particular, any refusal thereof. This is the most critical piece of evidence, and like a line-up, the procedure leading up to the breath test can substantially prejudice a defendant's case. There will be no fair trial if the defendant is prejudiced at this critical stage of the case.

CONCLUSION

Where we stand as a state with regard to protecting rights is not decided in the simply cases, but in the difficult ones. Do constitutional rights apply to everyone, regardless of the crime for which they are accused. Do we consistently apply these rights in all situations, or do we lose them by exception?

After arrest, Mr. Burns was questioned to obtain incriminating responses. That is, and always has been interrogation. Yet, the State would have this Court now define this as non-testimonial because this is a DUI case. The State seeks to introduce correct responses during interrogation in DUI cases, even though the rule has been that all statements must be suppressed in the absence of Miranda warnings. The State would have this Court put its approval on a "DUI exception" to the Florida Constitution, as the Fifth District has done.

Mr. Burns wants to be treated like other suspects and have his rights under Article one, sections 9 and 16 respected. That will only happen if this Court consistently applies the law.

Respectfully submitted,

Herbert H. Hall, Jr.

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 7th day of May, 1996.

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