Of 7

IN THE SUPREME COURT OF FLORIDA

KEVIN O'NEILL,

Petitioner,

v. CASE NO. 86,869

STATE OF FLORIDA,

Respondent.
_____/

RESPONDENT'S BRIEF ON THE MERITS

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STATEMENT OF FACTS

The State submits the following additions/corrections to O'Neill's Statement of the Case and Facts:

Pretrial:

Numerous, lengthy pretrial hearings were held in this case, addressing the following issues: the sufficiency of Florida's blood testing regulations, probable cause to arrest O'Neill, the legality of the search of his truck, probable cause to draw blood, police misconduct, and the reliability of the blood test kits.

As discussed extensively in Issue II, below, the State disagrees with O'Neill's statement of "fact" that Officer Futch did not have probable cause to order a blood draw. (See Petitioner's Brief at p. 2-3).

The trial court found that the search of O'Neill's truck was illegal, and it suppressed the fruits of that search. (R. 942). Specifically, the court suppressed the statement of O'Neill's companion that night, Todd Burns, as that statement was taken the next morning after Todd was located through the use of a business card found in the truck. (R. 247-48). However, since Todd would have been discovered inevitably through other investigative leads,

as the defense conceded, the trial court allowed the State to call Todd as a witness. (R. 422-23).

The court also found that O'Neill was arrested without sufficient probable cause. (R. 829-35). However, since O'Neill would have been required to remain at the scene anyway in order to facilitate the accident investigation, and since the determination of probable cause to draw blood was independent of the arrest, the court found that the illegal arrest did not taint the subsequent blood draw. (R. 893-95).

After extensive hearings on the reliability of the blood test kit, the trial court found that the reliability of the evidence was sufficiently established to be admissible at trial, with the weight of the evidence to be assessed by the jury. (R. 373-79). Witnesses at the hearings described the extensive controls and testing of the components of the test kits (including the swab and the vials) and the kits themselves. Evidence regarding the reliability testing of the specific lot of materials found in the blood test kit involved in this case was also admitted. (R. 17-163, 318-23, 452-615).

Trial:

After a lengthy jury trial, Kevin O'Neill was convicted of two counts of DUI manslaughter stemming from the deaths of two Satellite Beach police officers in the early morning of May 31, 1992. (T. 2086-87). The officers were standing near their patrol cars on the side of the road, having pulled over a group of teenagers, when O'Neill ran into them.

Numerous witnesses testified to O'Neill's inebriated state the night of the accident. O'Neill's companions that evening, people who encountered him at the bars they went to, and police officers who saw O'Neill shortly after the accident took place all testified that O'Neill was clearly under the influence of alcohol.

O'Neill's friend, Todd Burns, testified that he and O'Neill went to three bars that evening; they went to Crickets around 7:30 pm, then went to Shooters around 9 pm, then went to ABC around midnight. (T. 557-60, 563). Todd admitted that O'Neill was under the influence of alcohol that night, although he opined that O'Neill was not impaired. (T. 565-66).

Steven Anella, a bartender at Shooters who was trained in alcohol awareness, testified that he called security over to get O'Neill out of the bar after O'Neill passed out in front of him. (T. 592-94). Anella testified that O'Neill's speech was slurred,

his eyes were not focused, and he was wavering and leaning on the bar. (T. 593-94).

As O'Neill was leaving Shooters with Todd and another friend (Sharon Lyttle), Officer Edward Aziz, who was working security at the bar that night, approached them. Aziz testified that both O'Neill and Todd were highly intoxicated, very loud and abusive, staggering and falling down. O'Neill was basically hanging on Sharon to stay standing. (T. 657-58).

Because Sharon was not intoxicated, she drove the group, in O'Neill's truck, to ABC. (T. 659, 635-36). After staying at ABC for about 45 minutes, the three went to Sharon's house, again with Sharon driving. Sharon testified that in her opinion O'Neill was under the influence of alcohol to the extent that he should not have been driving, under state law. (T. 645). Sharon also testified that she probably would not have gotten in the car with O'Neill driving. (T. 639).

When the group got to Sharon's house, O'Neill was told to wait in his truck while Todd walked Sharon to her door. Sharon told O'Neill to wait for Todd and asked him to stay at Todd's house that night, rather than driving home. (T. 643). O'Neill said he would wait, but instead drove away while Todd was with Sharon. (T. 644).

Christopher Morris, a friend of the teens who were stopped by the Satellite Beach officers, was waiting down the road to see what was going to happen to his friends when he saw O'Neill's truck go by at a high rate of speed and swerve over. (T. 743). Jason Shevalier, one of the teens who was stopped, saw Officer Flagg walking near the side of one of the patrol cars when O'Neill's truck swerved over from the center lane and hit Flagg, then hit the other patrol cars. (T. 1258-63). Shevalier testified that O'Neill looked drunk and had red eyes. (T. 1283).

Numerous witnesses testified that although one of the patrol cars was parked in the right hand lane of the four lane road, this was not a situation where the patrol cars could not be easily seen or other cars could not get past. All three patrol cars had all their lights on, and they could be seen from quite a distance. (T. 723, 746, 775, 915). Several other cars went by the area where the teens were pulled over with no problem. (T. 725, 743, 800).

Trooper Futch of the Florida Highway Patrol arrived at the accident scene shortly after the collision and spoke with O'Neill in the batmobile. Futch noticed the odor of alcohol on O'Neill, and he testified that O'Neill was staring into space and had glassy eyes. (T. 942). Based on these observations, Futch ordered that a blood sample be taken from O'Neill. Futch explained that he did

not ask O'Neill to perform field sobriety tests because of the circumstances of the accident and the scene. (T. 1007-08).

Contrary to O'Neill's contention, Futch did not "verif[y] that the law had been broken when the officers stopped their vehicles in the position they were in at the time of the accident." (Petitioner's Brief at p. 12). Rather, Futch testified that he always tries to avoid creating a dangerous situation when conducting a traffic stop, but that it was routine to stop vehicles on the right of way. (T. 994-95, 1007).

Deputy Webb, another officer at the scene, testified that O'Neill was extremely intoxicated. (T. 1310). O'Neill had trouble getting out of the patrol car and had a moderate to strong odor of alcohol on his breath; he also had bloodshot, watery eyes, poor balance, and a noticeable slur in his speech. (T. 1305-06, 1309-10).

Trooper Michael Burroughs, who transported O'Neill from the scene of the crash, testified that O'Neill smelled strongly of alcohol, had slurred speech, and had slow motor skills. (T. 1581-82). During the ride to the police station, O'Neill volunteered several statements; he stated "I f---ed up, didn't I," wondered how much time he would have to serve, and noted that he never should have gone to Shooters. (T. 1582-83).

Barbara Buonocore, a paramedic and nurse who performed the blood draw, testified that O'Neill smelled of alcohol, was very thick-tongued, had slurred speech and droopy eyes, was unsteady on his feet, and had slightly dilated pupils. (T. 1037). Buonocore never testified that O'Neill's behavior was inconsistent with his blood alcohol level, but rather stated that she could not estimate his blood alcohol level nor testify to the accuracy of the result of the blood analysis. (T. 1048-49) (See Petitioner's Brief at p. 14).

Buonocore also explained the blood draw process. She testified that she checked the kit to make sure it had not expired and to make sure it looked okay. She then used a swab to prep O'Neill's arm for the blood draw; she specifically identified the swab as nonalcoholic from the color, texture, and odor. (T. 1033-36, 1039). Buonocore testified that the kit in this case was fine, and the blood draw was properly done.

Although Buonocore at one point stated that the vials in the kit contained a liquid, she later clarified this testimony and explained that she could not specifically remember the vials in this case and when she made that statement she was only trying to point out the difficulty of specifically remembering seeing substances in the tube. (T. 1074, 1742-44) (See Issue III).

The blood test kit used in this case was marked with an expiration date of June 1, 1992 (the kit was used May 31, 1992). David Tucker, the quality assurance manager for the vacutainer manufacturer, explained that the lot used for this kit was manufactured in June of 1990 and actually expired June 30, 1992. (T. 1131). The expiration date refers to the vacuum, which is good for at least two years and in reality lasts much longer. (T. 1131-32). If the kit had expired, the vacutainers would not have withdrawn the correct amount of blood, but would have withdrawn either no blood at all or very little. (T. 1132). The kit in this case appeared to have worked properly and provided a good blood sample. (T. 1631).

Walter Kennedy, an accident reconstruction specialist, testified as an expert witness for the State. (T. 1489-90). He estimated that O'Neill was traveling <u>at least</u> 58 m.p.h. before the accident and he could have been traveling as fast as 67 m.p.h. (T. 1530, 1562). The posted speed limit was 45 m.p.h. (T. 1343). Kennedy never "acknowledged that he had incorrect information when he gave his opinion." (Petitioner's Brief at p. 17). As to the example cited in the Petitioner's Brief regarding the weather at the time, Kennedy explained that he was informed by Corporal Jones of the Florida Highway Patrol that while it was raining an hour

earlier, at the time of the accident the road was dry; he confirmed this information by looking at photographs. (T. 1558).

Barry Funck, an analyst at the FDLE Orlando Regional Crime Lab, explained the process he used to test O'Neill's blood the morning after the accident. He testified that O'Neill's blood alcohol content was .22. (T. 1700). This alcohol content was the equivalent of 10.8 twelve-ounce cans of beer in O'Neill's system at the time of the blood draw. (T. 1702).

SUMMARY OF ARGUMENT

ISSUE I: The certified question should be answered in the affirmative. The clear language of the habitual offender statute includes as a "qualifying offense" any out-of-state offense substantially similar to an offense in Florida and punishable in the foreign state by more than one year imprisonment. The application of the statute is not dependent on the label assigned to that offense by the foreign state. O'Neill was properly sentenced as a habitual offender based on his South Carolina conviction for possession of cocaine.

ISSUE II: The result of O'Neill's blood alcohol test was properly admitted at trial. Trooper Futch had probable cause to draw O'Neill's blood, based on his own observations as well as information provided by other officers. The blood draw was not performed in violation of O'Neill's right to counsel, as he had no right to consult with counsel before providing this purely physical evidence. Finally, O'Neill did not establish improper police conduct, let alone conduct so egregious as to justify the suppression of the relevant blood evidence.

ISSUE III: The result of O'Neill's blood alcohol test was properly admitted at trial. O'Neill did not establish probable tampering, and accordingly the issue of the alleged tampering went to the weight of the test, not its admissibility. While the nurse did initially testify that the vials in the blood test kit contained a liquid anticoagulant, she later recanted this testimony, reiterated her prior testimony that she did not specifically remember this kit, and explained that the point she was trying to make was that it was no big deal to not remember because the chemicals, whether liquid or powder, are hard to see, and she checks the chemicals as a matter of course.

Finally, any error in admitting the blood test result was harmless, in light of the other overwhelming evidence of intoxication.

ARGUMENT

ISSUE I

THE DISTRICT COURT PROPERLY AFFIRMED O'NEILL'S HABITUAL OFFENDER SENTENCE.

O'Neill first argues that the trial court erred in sentencing him to 30 years imprisonment as a habitual offender. According to O'Neill, he did not qualify for such sentencing because the State failed to prove the requisite two prior felonies/qualified offenses. Specifically, O'Neill contends that his 1988 conviction for possession of cocaine in South Carolina should not have been used to satisfy the habitual offender requirements.

The district court rejected O'Neill's argument, finding that under the clear language of the habitual offender statute the South Carolina conviction was properly considered. The court then went on to certify the following as a question of great public importance:

> MAY AN OUT-OF-STATE CONVICTION WHICH IS A MISDEMEANOR IN THAT STATE, BUT WHICH IS SUBSTANTIALLY SIMILAR TO A FLORIDA STATUTE IN ELEMENTS AND PENALTIES, BE DEEMED A "QUALIFIED OFFENSE" UNDER SECTION 775.084 AND USED TO IMPOSE A HABITUAL OFFENDER SENTENCE?

O'Neill v. State, 661 So. 2d 1265, 1268 (Fla. 5th DCA 1995). The decision of the district court should be approved by this Court, and the certified question answered in the affirmative.

A trial court may sentence a defendant as a habitual felony offender if the defendant has previously been convicted of two or more felonies or other qualified offenses, and if the felony for which the defendant is sentenced was committed within five years of his last prior felony/qualified offense. § 775.084(1)(a), Fla. Stat. (1991). A "qualified offense" is defined in the statute as:

> any offense, substantially similar in elements and penalties to an offense in this state, which is in violation of a law of any other jurisdiction ... [including any other state] ... that was punishable under the law of such jurisdiction at the time of its commission by the defendant by death or imprisonment exceeding 1 year.

§ 775.084(1)(c), Fla. Stat. (1991).

This statute is clear and unambiguous. If a defendant has committed an offense, similar to a Florida offense, in a foreign jurisdiction, and in that jurisdiction the offense is punishable by more than one year imprisonment,[1] the offense is a "qualified offense" for purposes of habitualization.

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[1]In Florida, an offense punishable by more than one year in prison is classified as a felony. § 775.08(1), Fla. Stat. (1991). As evidenced by the facts in this case, the classification of "felony" is not the same in all states.

In this case, O'Neill entered a plea to possession of cocaine in South Carolina. Pursuant to South Carolina statute, O'Neill's offense was punishable in that state by a term of "imprisonment exceeding one year" -- two years. S.C. Code 44-53-370(d)(1). Accordingly, O'Neill's conviction falls under the plain language of the habitual offender statute as a "qualified offense."

While O'Neill attempts to attach some significance to the fact that his 1988 offense was labeled a "misdemeanor" in South Carolina, this argument ignores the plain language of the statute. The habitual offender statute defines "qualified offense" in terms of the possible sentence for the offense, not whether the foreign jurisdiction has chosen to attach the label "felony" to that offense. Accordingly, under the statute it is simply irrelevant whether the foreign jurisdiction classifies the offense as a felony or a misdemeanor (or, for that matter, uses a classification system which rejects both those terms and creates categories of crimes which are completely unique to that state).

O'Neill argues that using his prior "misdemeanor" conviction as a "felony" conviction for enhancement purposes violates due process and is ex post facto; such an argument is based on an erroneous premise. O'Neill's prior conviction has not been transformed into a felony, as O'Neill seems to claim. His

conviction is regarded as that which it has always been -- a conviction of a crime carrying a sentence of imprisonment exceeding one year. There has been no change in classification, for classification is meaningless under the statute.

Finally, given the clarity of the statute, O'Neill's argument that it must be construed in his favor under the doctrine of lenity is unavailing -- there is no ambiguity to be construed. The language of the statute is plain and unambiguous, reflecting "a legislative choice which, when plainly stated, offers little room for judicial gloss." White v. State, 21 Fla. L. Wkly. S35 (Fla. Jan. 18, 1996).

A foreign conviction does not need to be labeled a felony for the conviction to trigger habitualization in Florida. Had the Legislature intended otherwise, it could have easily said So. See Tillman v. State, 609 So. 2d 1295, 1297 (Fla. 1992). O'Neill's 1988 South Carolina conviction falls under the plain language of the statute as a "qualified offense," for it was unquestionably punishable in that state at that time by a sentence exceeding one year imprisonment.

Likewise unavailing is O'Neill's argument that his South Carolina possession of cocaine offense has no comparable counterpart in Florida. In fact, Florida has a statute which

defines and punishes possession of cocaine in a manner substantially similar to South Carolina statute. South Carolina prohibits the knowing or intentional possession of a controlled substance, including cocaine, unless the substance is obtained with a valid prescription or otherwise authorized. S.C. Code § 44-53-370(c). Florida prohibits the actual or constructive possession of a controlled substance, including cocaine, unless obtained with a valid prescription or otherwise authorized. § 893.13(1)(f), Fla. Stat. While not mirror images of each other, the two statutes are "substantially similar."

The penalties for the two crimes are also "substantially similar." In South Carolina, the possible penalty for possession of cocaine is two years in prison, with up to a $5000 fine. S.C. Code § 44-53-370(d)(1). In Florida, the possible penalty for possession of cocaine is up to five years in prison, with up to a $5000 fine. § 775.082(3)(d), 775.083(1)(c) Fla. Stat. While in Florida this crime is not classified as a misdeamonor, but a third degree felony, this difference in labels is irrelevant.[2] Again, the relevant concern under the statute is the offense and punishment, not the classification label.

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[2]In fact, while South Carolina has labeled its offense a misdemeanor, it has imposed a possible punishment which is equivalent to the punishment for a felony in Florida.

Accordingly, under the clear, unambiguous language of the habitual offender statute, the South Caroline conviction was a "qualified offense" subjecting O'Neill to enhanced penalties under the statute. O'Neill's arguments to the contrary should be rejected.[3]

O'Neill finally argues that even if he technically qualified for sentencing as a habitual offender, the trial court should have refrained from imposing such a severe sentence and instead should have exercised its discretion to sentence him more leniently. O'Neill provides no support for the proposition that a trial court's decision to legally sentence a defendant within the statutory maximum is reviewable on appeal, and the State submits that such review is unauthorized and unwise. The arguments made to this Court are arguments more properly made to the trial court, which retains the discretion to fashion a sentence appropriate to the goals of sentencing and the circumstances of the case.

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[3]O'Neill cites numerous sentencing guidelines cases in support of his argument. These cases are not applicable here. In the guidelines cases, the court must assign a specific score for the Florida statute which is most analogous to the out-of-state conviction. Fla. R. Crim. P. 3.701(d)(5)(B). Accordingly, the specific categorization of the offense is very important in these cases. Under the habitual offender statute, however, the out-of-state conviction is determined to be either qualifying or not on the basis of the sentence assigned to that conviction by the foreign state, not on the basis of its label.

Should this Court decide to review the wisdom of the sentence imposed below, the State submits that the trial court's decision not to exercise its power of leniency is fully supported by the facts of this case. According to O'Neill, he is not the type of person from whom society needs protecting, as his record shows he is simply a substance abuser and irresponsible driver. A review of O'Neill's lengthy criminal history and the circumstances of this case reveals the fallacy of this characterization.

As found by the trial court in its thorough sentencing order, Kevin O'Neill has been charged with 24 separate crimes and has been convicted of at least 7 misdemeanors and 3 felonies or qualified offenses. Further, O'Neill has been placed on probation 5 times and has 6 withholdings of adjudication. He has also been through alcohol rehabilitation in the past. (R. 1541-45). This is a defendant who has had numerous opportunities to reform, yet chose to continue his criminal conduct.

The facts of the instant case reveal, moreover, that O'Neill's choices have very serious consequences for the safety of the public. O'Neill was described as extremely intoxicated by numerous witnesses, his blood alcohol level was over twice the legal limit, and he was with friends who asked him to stay with them so he could avoid driving. Instead, O'Neill chose to get behind the wheel of

his car and attempt to drive home, resulting in the tragic deaths of two police officers. It is hard to understand how a man who makes such decisions, with such drastic consequences, could claim that he is not a danger to the public.[4]

O'Neill is correct in that a trial judge does retain the discretion to exercise leniency and refrain from sentencing a defendant as a habitual offender even if he qualifies as such under the statute. McKnight v. State, 616 So. 2d 31 (Fla. 1993); King v. State, 597 So. 2d 309, 314-15 (Fla. 2d DCA), rev. denied, 602 So. 2d 942 (Fla. 1992). Given the circumstances of this case and O'Neill's criminal history, the trial court properly declined to exercise such leniency and acted well within its discretion in sentencing O'Neill to 30 years as a habitual offender. O'Neill's sentence should be affirmed by this Court.

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[4]In support of his leniency argument, O'Neill contends that the newly revised version of the habitual offender statute shows a legislative policy of forbearance for offenders whose crimes stem from substance abuse. In fact, even under the new statute O'Neill would still qualify for habitualization. § 775.084, Fla. Stat. (1993) (habitualization proper where felony for which defendant is to be sentenced and one of his two prior convictions involves more than mere possession or purchase of controlled substance).

ISSUE II

O'NEILL'S BLOOD WAS PROPERLY DRAWN.

O'Neill next argues that the trial court should have suppressed evidence of the results of his blood alcohol test because his blood was improperly drawn. This issue, resolved without comment by the district court, lies beyond the scope of the certified question and need not be addressed by this Court. See, e.g., Goodwin v. State, 634 So. 2d 157 (Fla. 1994) (declining to address issues beyond the scope of certified question). Should this Court exercise its discretion and choose to address this issue, the State contends that O'Neill's claims should be rejected.

O'Neill contends that the blood draw was improper because there was no probable cause to order the draw, because O'Neill was not read his Miranda rights before his blood was drawn, and because the police conduct was improper. These claims will be addressed individually below.

PROBABLE CAUSE:

Pursuant to § 316.1933(1), Florida Statutes, a law enforcement officer may require a driver to submit to a blood test to determine his blood alcohol content in cases involving death or serious

bodily injury. In order to require such a test, the officer must have probable cause to believe that the driver may have been under the influence of alcohol. Such cause exists "if the officer, based upon reasonably trustworthy information, has knowledge of facts and circumstances sufficient to cause a person of reasonable caution to believe that the suspect driver was under the influence of alcoholic beverages at the time of the accident and caused the death or serious bodily injury of a human being." Jackson v. State, 456 So. 2d 916, 918 (Fla. 1st DCA 1984).

Here, John Futch, a trooper with the Florida Highway Patrol, made the decision that a blood draw was appropriate. Futch, who had been with the Highway Patrol for 19 years, surveyed the accident scene and evaluated the damage and injuries involved when he arrived at the site that night. (R. 848, 853-55). He spoke to other officers at the scene and found out who the driver of the truck was, then went in to talk to O'Neill. (R. 857-58). Futch noticed that O'Neill smelled of alcohol, had glassy, watery eyes, a flushed face, and slurred speech.[5] (R. 860). Futch testified that from his experience, O'Neill's appearance and conduct was

[5]The trial court noted that the video tape of the blood draw confirmed Futch's testimony that O'Neill's speech was slurred. (R. 892).

similar to others who were under the influence of alcohol. (R. 873).[6]

Based on his observations and information he received from other officers at the scene, Futch reasonably believed that O'Neill was under the influence of alcoholic beverages at the time of the accident and that he had caused the death or serious bodily injury of two police officers. Given the circumstances, Futch clearly had probable cause to order the blood draw. See Keeton v. State, 525 So. 2d 912, 914 (Fla. 2d DCA) (officer had probable cause for blood draw where he smelled strong odor of alcoholic beverages on defendant's breath and knew that defendant was driver of vehicle which caused at least one death), rev. denied, 534 So. 2d 400 (Fla. 1988); State v. Silver, 498 So. 2d 580 (Fla. 4th DCA 1986) (officer had probable cause for blood draw where driver had odor of alcohol

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[6]O'Neill's argument that Futch saw nothing inconsistent with a simple accident victim is refuted by this testimony. A simple accident victim does not smell of alcohol, slur his speech, and have glassy, watery eyes.

O'Neill also argues that Futch's testimony was contradicted by the testimony of the nurse/paramedic who drew O'Neill's blood. Again this argument is refuted by the record, and in fact the testimony of the nurse corroborates Futch's testimony. In the nurse's opinion, O'Neill was impaired when she drew his blood. He was very thick-tongued and his speech was slurred, his eyes were droopy, he was unsteady on his feet, his pupils were slightly dilated, and he smelled like alcohol. (T. 1037). It is difficult to see how this testimony contradicted Futch's description of O'Neill.

on his breath and person in other car was dead), rev. denied, 506 So. 2d 1043 (Fla. 1987). The trial court's finding of probable cause is fully supported by the record. See Cox v. State, 473 So. 2d 778, 781 (Fla. 2d DCA 1985).

MIRANDA:

Pursuant to Article I, Section 9 of the Florida Constitution, a criminal suspect has a constitutional privilege against self-incrimination. Accordingly, once a suspect has been taken into custody he may not be interrogated until he has been informed of his Miranda rights, including his right to counsel. Traylor v. State, 596 So. 2d 957, 964-66 (Fla. 1992).

Statements obtained in violation of the guidelines set forth by this Court in Traylor may not be used by the State, but these safeguards apply only to statements obtained through interrogation.[7] 596 So. 2d at 966. The privilege against self-incrimination does not protect a suspect from being compelled to provide physical evidence. See, e.g., St. George v. State, 564 So. 2d 152, 154 (Fla. 5th DCA 1990). Such evidence is non-testimonial

[7]Interrogation takes place when a suspect 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." Traylor, 596 So. 2d at 966 n. 17.

in nature, and the request for such evidence does not attempt to elicit an incriminating response, for no communicative response is required.

Accordingly, obtaining physical evidence of a blood sample from a defendant does not violate his privilege against self-incrimination, nor does it require the reading of Miranda warnings or the presence of counsel. See, e.g., Schmerber v. California, 384 U.S. 757 (1966) (forcing a defendant to submit to a blood test does not violate the Fifth Amendment because physical evidence is not protected by the privilege against self-incrimination); Brackin v. Boles, 452 So. 2d 540, 543 (Fla. 1984) (taking of a blood sample is not prohibited by the state or federal constitutions); State v. Hoch, 500 So. 2d 597, 599-600 (Fla. 3d DCA 1986) (there exists no Fifth Amendment right to counsel prior to deciding whether to submit to breath test because involves no communication), rev. denied, 509 So. 2d 1118 (Fla. 1987). See also Cox, 473 So. 2d at 781-82 (no right to consult with counsel before mandatory blood test, and there was no issue on which counsel could have advised defendant anyway).

O'Neill had no right to communicate with an attorney before submitting to the blood draw, and the blood test was not obtained in violation of his right to counsel.[8]

IMPROPER POLICE CONDUCT:

Finally, O'Neill argues that the trial court erred in refusing to suppress the blood test result because of allegedly improper police conduct. O'Neill bases his argument on the fact that he was improperly arrested and the police failed to conduct field sobriety tests.

All three of the Satellite Beach police officers on duty were at the scene of the accident that night. (T. 892). Officer Braden had pulled over the Mustang, Officer Flagg had come to assist, and Sergeant Hartmann had come to supervise. When O'Neill crashed into the patrol cars, Officer Braden was thrown over his car and landed on the ground. (T. 846). When he got to his feet, he immediately noticed his coworker, Officer Flagg, lying completely still on the ground, obviously injured. (T. 850).

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[8]O'Neill's vague claim that uncounseled "verbal responses" should have been suppressed does not form a basis for relief, as O'Neill fails to identify what "verbal responses" he is referring to.

Braden then turned his attention to the vehicle which had struck the other cars, saw O'Neill trying to exit the vehicle and smelled alcohol on his person. Braden drew his firearm, handcuffed O'Neill, and placed him in his patrol car. (T. 850-54). Braden testified that "[e]verything happened so fast it was like being in the twilight zone and being dropped and trying to control something that wasn't able to be controlled." (T. 853).

While this arrest was ultimately held to be without probable cause, it was certainly understandable, given the circumstances. This action by Officer Braden, while not a proper arrest, surely does not rise to the level of police misconduct. Moreover, as held by the trial court, any taint from the illegal arrest was dissipated by the fact that O'Neill would have been required to remain at the scene whether arrested or not, and before the blood draw was performed an independent officer had established probable cause. (R. 893-95). O'Neill's argument that the blood draw was improper because he was illegally arrested must be rejected.

As to the absence of field sobriety tests, again O'Neill has failed to establish any misconduct. In Arizona v. Youngblood, 488 U.S. 51 (1988), the United States Supreme Court discussed the issue of police misconduct as it relates to the destruction of evidence, holding that sanctions are appropriate for such conduct where the

defendant has demonstrated that the police acted in bad faith and destroyed material evidence. However, the Court also specifically noted that the State has absolutely no constitutional duty to create any specific type of evidence or perform any particular tests. Id. at 58-59. Accordingly, no sanction is appropriate in this case, because the State had no duty to conduct field sobriety tests in the first place.

Moreover, the State's failure to conduct such tests here was fully explained by the officer who made that decision. Sergeant Michael Burroughs, the Florida Highway Patrol trooper who was the supervisor at the accident scene, testified that his agency had no policy requiring field sobriety tests. Normally these tests are given in simple DUI cases, unless the road conditions or the weather are bad, or the suspect is so impaired that he or she would fall down.

In cases where there has been an accident, however, Burroughs stated that it was his practice to not give field sobriety tests. Because the suspect may be injured from the crash or may be in shock, it would be unfair to the suspect to require these tests. Further, in cases such as this, where a blood draw was called for, there really is no need for such tests. Accordingly, given the circumstances of this case, including the severity of the crash,

the fact that a blood draw was performed, the possible injuries to O'Neill (he had blood on his arms from small cuts of glass), and the chaos at the scene (including numerous law enforcement personnel and media representatives), Burroughs concluded that he would not give these tests to O'Neill. (R. 897-99, 902-04, 909-12).

Contrary to O'Neill's argument, the failure to give him sobriety tests was not a willful failure to follow established policy in order to avoid collecting exculpatory evidence. The testimony on this issue revealed that standard policy was followed here. Further, the absence of field sobriety tests, like the absence of any other evidence, was properly and extensively argued by the defense as it related to the issue of reasonable doubt.

The actions of the police in this case did not rise to the level of misconduct, let alone misconduct which somehow tainted the blood draw or was so egregious that suppression of this legal and proper blood test was necessary in order to sanction the State. O'Neill's argument should be rejected.

ISSUE III

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ADMITTING EVIDENCE OF THE RESULTS OF THE BLOOD ALCOHOL TEST.

O'Neill finally argues that the results of his blood alcohol test should have been excluded because of alleged tampering with the vials in the blood test kit. Again, this issue lies beyond the scope of the certified question and need not be addressed by this Court. If this Court chooses to address this issue, O'Neill's argument should be rejected.

Relevant physical evidence is admissible "unless there is an indication of probable tampering." Peek v. State, 395 So. 2d 492, 495 (Fla. 1980) (emphasis added), cert. denied, 451 U.S. 964 (1981). Here, the evidence of alleged tampering was specifically recanted and contradicted by other evidence in the record. The blood test was therefore properly admitted into evidence, and the issue of its reliability was properly resolved by the jury.

O'Neill's argument stems from the testimony of Barbara Buonocore, a paramedic and nurse who drew O'Neill's blood at the accident scene. On direct examination, Buonocore testified that she did not remember if the proper substances were present in the vials in this case, but it is her general practice to check the

tubes to make sure they look okay. (T. 1036). Near the end of an antagonistic cross-examination, Buonocore stated that it was her practice to check the tubes, she did so here, and you can't really see the chemicals anyway because they are a clear, syrupy liquid. (T. 1040, 1069, 1074).

Buonocore was recalled later in the trial to clarify her testimony. She stated that she did not specifically recall what was in the tubes in this case, that some of the kits she used in her experience contained liquid and some contained a powder, and that the point she was trying to make in her previous testimony was that the chemicals are such that they are not really noticeable and can barely be seen, but she makes a practice of looking at the tubes to make sure they seem okay. (T. 1741-44, 1752-55).

Given this explanation, O'Neill's argument that there must have been something wrong with the tubes because they contained a liquid is an argument which goes to the weight of the evidence, not its admissibility, and this issue was properly resolved by the trier of fact. Buonocore recanted her testimony that there was a liquid in the tubes and instead reiterated her prior testimony that she just did not remember, but it was no big deal to check them, she does so automatically, and she did remember that the vials in this case were fine.

Given this testimony, as well as the testimony of the other witnesses regarding the quality controls in the manufacturing process and the composition of the blood test kit, the evidence of the test result was properly submitted to the jury and its weight and credibility determined by them. See Hutchinson v. State, 580 So. 2d 257, 263 (Fla. 1st DCA 1991) (cocaine properly admitted where State's evidence was sufficient to overcome concerns about possible tampering); State v. Lewis, 543 So. 2d 760, 766-67 (Fla. 2d DCA 1989) (question of possible tampering with carpet and its effect on luminol test went to weight of evidence, not admissibility); Dodd v. State, 537 So. 2d 626 (Fla. 3d DCA 1988) (cocaine should not have been admitted where unexplained gross discrepancies in weights and packaging details indicated probable tampering).

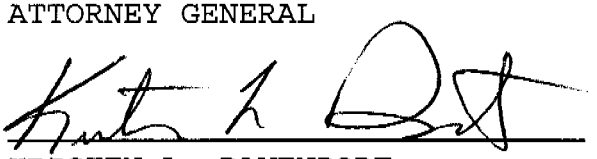
Finally, even if the blood test results should not have been admitted at trial, any error was harmless. Numerous witnesses testified to O'Neill's inebriated condition, and even in the absence of the blood test there was overwhelming evidence of O'Neill's impairment. Given this other evidence, there is no reasonable possibility that the error complained of here contributed to the jury's verdict. See State v. DiGuilio, 491 So. 2d 1129, 1135 (Fla. 1986).

CONCLUSION

Based on the arguments and authorities presented herein, appellee respectfully requests this honorable Court answer the certified question in the affirmative and approve the decision of the district court in all respects.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above Respondent's Brief has been furnished by U.S. mail to Sharon Lee Stedman, 1516 East Hillcrest Street, Suite 108, Orlando, Florida 32803, this 9th day of February, 1996.

Kristen L. Davenport
Counsel for Respondent

IN THE SUPREME COURT OF FLORIDA

KEVIN O'NEILL,

Petitioner,

v. CASE NO. 86,869

STATE OF FLORIDA,

Respondent.
_____/

APPENDIX

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visions relate to the mother's abil-
operly care for and supervise her
rn infant and are thus indicators
bility to properly parent those of
dren who have been adjudicated
nt. By permitting adjudication of
based upon the abuse, neglect or
ment of that child's sibling, the
courts have recognized the rela-
between a parent's ability to care
child and that parent's ability to
other children. The court there-
s the permanent placement plan
ents concerning the new child to
priate provisions.

9.451, Fla.Stat. (1993), addresses
e agreements. According to sub-
the performance agreement shall
not be limited to a list of ten
section (3)(d) requires the perfor-
eement to include "[t]he specific
e taken by the parent or parents
to eliminate or correct *the identi-
ns or conditions which were the
e adjudication of dependency* in
placements...." (emphasis sup-
the hearing on the agreement,
o subsection (6)(b)2., the court
nine if "[t]he agreement is consis-
e requirements for the content of
ce agreement as provided in sub-
" And according to subsection
court shall determine whether
ment is meaningful and designed
*facts and circumstances upon
ourt based the finding of depen-*
voluntary placements...." (em-
lied).

major problems identified in the
proceedings were exposure to
ug dealing, dangerous weapons,
, and the lack of cleanliness of
nt. To the extent the tasks iden-
performance agreement relate to
s that originally led to the pro-
olving the dependent children,
cleanliness of the apartment and
dangerous items such as razor

ad completed her parenting classes
dom drug tests were negative. She
process of obtaining adequate hous-

blades and firearms, they are appropriately included in the performance agreement. But insofar as the tasks relate only to the new baby, who has not been adjudicated dependent, and not to previously identified problems or conditions, the tasks are not authorized.

In an apparent reference to *Padgett v. Department of Health and Rehabilitative Services*, 577 So.2d 565 (Fla.1991), and its progeny, the trial judge's rationale for her ruling was that the adjudication of one child may be based on proof of abuse or neglect of a sibling. In *Padgett*, the supreme court held that "the permanent termination of a parent's rights in one child under circumstances involving abuse or neglect may serve as grounds for permanently severing the parent's rights in a different child." *Id.* at 571. *See also C.F. v. Department of Health and Rehabilitative Services*, 649 So.2d 295 (Fla. 1st DCA 1995) (finding of dependency may be predicated on proof of neglect or abuse of sibling); *In the interest of M.T.T.*, 613 So.2d 575 (Fla. 1st DCA 1993). A critical distinction exists, however, in that in the present case, there has been no effort to declare the new baby dependent. If a petition for dependency had been filed, under the rationale of *Padgett*, evidence of abuse or neglect in regard to the adjudicated children may have been supportive of the efforts to have the baby found dependent. However, as far as the record on appeal shows, no dependency petition has been filed.[2] Since there has been no effort to have the baby adjudicated dependent, we agree with appellant that the trial court was without authority to enter an order approving the performance agreement to the extent the tasks included relate solely to the unadjudicated baby.

The petition for certiorari is granted. The order approving the performance agreement is quashed in part and remanded with directions to remove from the performance agreement those tasks relating solely to the unadjudicated baby.

BOOTH and BENTON, JJ., concur.

Kevin O'NEILL, Appellant,

v.

STATE of Florida, Appellee.

No. 94-819.

District Court of Appeal of Florida, Fifth District.

Oct. 27, 1995.

Defendant was convicted in the Circuit Court, Brevard County, John Dean Moxley, Jr., J., of driving-under-the-influence manslaughter, and he appealed from imposition of habitual offender sentences. The District Court of Appeal, W. Sharp, J., held that South Carolina conviction for possession of cocaine was "qualified offense" for purposes of habitual offender statute.

Questions certified.

Cobb, J., concurred in part, dissented in part, and filed opinion.

Criminal Law ⇐1202.5(3)

South Carolina conviction for possession of cocaine was "qualified offense," within meaning of Florida's habitual offender statute, even though possession of cocaine was classified in South Carolina as a misdemeanor, where South Carolina statute was substantially similar to Florida statute proscribing same offense as a felony and South Carolina imposed punishment which was equiva-

2. One of the fathers, C.B., has filed a brief arguing that the dependency order underlying this case is defective in that it does not find dependency as to the father(s) as well as the mother. First, the underlying dependency order is not the subject of this appeal. Second, this court recently rejected C.B.'s argument in *Department of Health and Rehabilitative Services v. P.H.*, 659 So.2d 1375 (Fla. 1st DCA 1995).

lent to punishment for felony in Florida. West's F.S.A. § 775.084.

See publication Words and Phrases for other judicial constructions and definitions.

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W. SHARP, Judge.

O'Neill appeals his sentences after being convicted of two counts of DUI/manslaughter.[1] He was involved in a traffic accident, which claimed the lives of two police officers in Brevard County. The trial judge imposed two thirty-year concurrent habitual offender sentences, which were beyond the permitted guidelines range,[2] but within the statutory maximum. O'Neill claims the trial court erred in relying upon a South Carolina "misdemeanor" conviction as one of the two convictions necessary to support an habitual offender sentence. We affirm the judgment and sentences in all respects.

Before a court may sentence a defendant as an habitual felony offender it must make a finding that the defendant has previously been convicted of two or more felonies in this state, or two or more other qualified offenses, within the last five years. § 775.084(1)(a), Fla.Stat. (1991).[3] O'Neill argues that he did not meet the statutory criteria for being declared an habitual offender because one of the two convictions used to habitualize him, a South Carolina conviction for possession of cocaine, was labeled a misdemeanor by the South Carolina statute, which proscribes this offense.

In support of this argument, O'Neill relies on a series of guidelines "scoring" cases under Florida Rule of Criminal Procedure 3.701 in which it has been held that scoring for "prior convictions" in a guidelines sentence should be at the same degree as existed for the offense at the time the convictions were imposed. *See Frazier v. State,* 515 So.2d 1061, 1062 (Fla. 5th DCA 1987); *Roberts v. State,* 507 So.2d 761 (Fla. 1st DCA 1987); *Johnson v. State,* 476 So.2d 786 (Fla. 1st DCA 1985); *Pugh v. State,* 463 So.2d 582 (Fla. 1st DCA 1985). However this rationale ignores the language of section 775.084. The cases cited by O'Neill rely on the Committee Note to Rule 3.701(d)(5), which directs that any uncertainties in scoring "prior record" in guideline sentences be resolved in favor of the defendant. Further, these cases involve *Florida* offenses, as opposed to out-of-state offenses, which have been modified to a different class or degree subsequent to the defendant's original conviction and sentence.

O'Neill's argument ignores the provisions of the statute which relate to "qualified offenses," and instead relies solely on the term "felonies." Under section 775.084(1)(a)1, it is clear that to habitualize a defendant there must be either two felonies committed in Florida *or* other qualified offenses. A "qualified offense" is defined under section 775.084(1)(c) as:

> Any offense, *substantially similar in elements and penalties to an offense in this state,* which is in violation of a law of any other jurisdiction, whether that of another state, the District of Columbia, the United States, or any possession or territory

1. § 316.193(3)(c)3, Fla.Stat. (1991).

2. *See* § 775.082, Fla.Stat. (1991). O'Neill concedes that his scoresheet totalled 275 points, placing him in a recommended range of 17 to 22 years and a permitted range of 12 to 27 years. The maximum statutory term of incarceration applicable to a second degree felony, absent habitual offender treatment, is fifteen years.

3. Section 775.084(1)(a), Fla.Stat. (1991) provides:
   1. The defendant has previously been convicted of any combination of *two or more felonies in this state or other qualified offenses;* [and]
   2. The felony for which the defendant is to be sentenced was committed within 5 years of the date of the conviction of the last prior felony or other qualified offense of which he was convicted, or within 5 years of the defendant's release, on parole or otherwise, from a prison sentence or other commitment imposed as a result of a prior conviction for a felony or other qualified offense, whichever is later; ... (emphasis supplied)

thereof, or any foreign jurisdiction, *that was punishable* under the law of such jurisdiction at the time of its commission by the defendant *by death or imprisonment exceeding 1 year.* (emphasis supplied)

Section 775.084(1)(c)'s definition of qualified offense makes *any* non-Florida conviction for an out-of-state offense with elements similar to a Florida felony offense and which provides for a penalty of one year imprisonment, to death, available to impose an habitual offender sentence. The label given the out-of-state offense by the other jurisdiction is not controlling. Any other interpretation would render the inclusion of the provisions for qualified offense, meaningless.

A comparison between the South Carolina statute, section 44–53–370D,[4] and the comparable Florida statute, section 893.13(1)(f)[5], reveals the two statutes *are* substantially similar. For a first offense, section 44–53–370(d)(1) classifies possession of a Schedule II (cocaine)[6] controlled substance as a misdemeanor, but it provides for imprisonment for a period of up to two years. It also provides for a fine of $5,000. The statute increases in classification to a felony upon the commission of a second offense, and increases imprisonment to a possible term of five years. A third conviction triggers more serious sanctions. Possession must be knowing or intentional. The thrust of this statute is to classify the offense by the number of convictions, imposing more serious classifications as the number of convictions increase.

The Florida statute, section 893.13(1)(f), prohibits possession of a controlled substance, among which is cocaine, the offense for which O'Neill was convicted in South Carolina. Violation of this statute in Florida constitutes a felony of the third degree, and is punishable by a term of imprisonment not to exceed five years (section 775.082(3)(d)) and/or a fine of up to $5,000 (section 775.083(c)). Possession must be actual or constructive.

Viewed in light of the foregoing, we conclude the South Carolina conviction constitutes a qualified offense under Florida's habitual offender statute. In either South Carolina or Florida, possession[7] of cocaine subjects the perpetrator to imprisonment for more than one year, and a fine of up to $5,000. Moreover, the actual language of the two statutes is substantially similar, and in part, contains virtually identical language.[8]

4. Section 44–53–370(d), S.C.Code provides:

> (d) A person who violates subsection (c) with respect to
> (1) A controlled substance classified in schedule I(b) and (c) which is a narcotic drug lysergic acid, diethylamide (LSD) and in schedule II which is a narcotic drug is guilty of a misdemeanor, and upon conviction, must be imprisoned not more than two years or fined not more than $5,000 or both. For a second *offense, the offender is* guilty of a felony and, upon conviction, must be imprisoned not more than five years or fined not more than five thousand dollars, or both.....

5. We reject O'Neill's contention that the comparable Florida statute is section 893.13(1)(g), violation of which is a misdemeanor in the first degree. O'Neill concedes that the subject of the South Carolina conviction was cocaine, and subsection (1)(g) proscribes the possession of *cannabis,* not cocaine. Possession of cocaine is proscribed by section 893.13(1)(f), which provides:

> It is unlawful for any person to be in *actual or constructive possession* of a *controlled substance* unless such controlled substance was lawfully obtained from a practitioner or pursuant to a valid prescription or order of a practitioner while acting in the course of his professional practice or to be in actual or constructive possession of a controlled substance except as otherwise authorized by this chapter. (emphasis supplied)

6. § 44–53–210, S.C.Code (1993).

7. Although the South Carolina statute requires knowing and intentional possession, and the Florida statute requires actual or constructive possession, we can discern no substantial difference between the two. "Knowingly" means with actual knowledge and understanding of the facts. *Shaw v. State,* 510 So.2d 349, 350 (Fla. 2d DCA 1987). In South Carolina the term "knowingly" has been defined to include not only actual knowledge, but also knowledge which should have been gained by reasonable inspection when the circumstances are such to put a reasonable person on inquiry: *i.e.,* constructive knowledge. *State v. Thompkins,* 263 S.C. 472, 211 S.E.2d 549, 554 (S.C.1975).

8. Section 44–53–370(c) of the South Carolina statute provides:

> It shall be unlawful for any person knowingly or intentionally to possess a controlled substance unless the substance was obtained directly from or pursuant to a valid prescription

Pursuant to section 775.084(c), it is not necessary that the statutes mirror one another. The out-of-state conviction need only be "substantially similar" to section 893.13(1)(f) in elements and penalties. Although South Carolina has labeled this offense a "misdemeanor," it has imposed punishment which is equivalent to punishment for a felony in Florida.

The Florida Supreme Court has held that the habitual offender statute must be complied with strictly. *Massey v. State*, 609 So.2d 598 (Fla.1992); *Reynolds v. Cochran*, 138 So.2d 500 (Fla.1962). The language in section 775.084 is clear and unambiguous in its intent to consider out-of-state convictions which are substantially similar to Florida felony offenses, in the same manner as the comparable Florida offense.

We find the South Carolina and Florida statutes to be substantially similar under 775.084, and we affirm the convictions and sentences below. However, because this is a case of first impression, and because of the doctrine of lenity in interpreting criminal statutes,[9] we certify as a question of great public importance [10] the following question to the Florida Supreme Court:

MAY AN OUT-OF-STATE CONVICTION WHICH IS A MISDEMEANOR IN THAT STATE, BUT WHICH IS SUBSTANTIALLY SIMILAR TO A FLORIDA STATUTE IN ELEMENTS AND PENALTIES, BE DEEMED A "QUALIFIED OFFENSE" UNDER SECTION 775.084 AND USED TO IMPOSE A HABITUAL OFFENDER SENTENCE?

AFFIRMED.

PETERSON, C.J., concurs.

COBB, J., concurs in part, dissents in part, with opinion.

COBB, Judge, concurring in part, dissenting in part.

I concur in the affirmance of the judgments and sentences of the trial court. I see no reason to certify a question that is answered by the unambiguous language of a statute, in this case, section 775.084(1)(c), Florida Statutes.

Dexter STUBBS, Appellant,

v.

STATE of Florida, Appellee.

No. 95–465.

District Court of Appeal of Florida, Fifth District.

Oct. 27, 1995.

Defendant was convicted in the Circuit Court, Orange County, Anthony Johnson, Senior Judge, of trafficking in cocaine, and defendant appealed. The District Court of Appeal, Antoon, J., held that: (1) fact that police officers did not advise defendant of his right to refuse consent to search of his luggage did not render his consent involuntary; (2) defendant's alleged limited education did not preclude him from giving knowing and voluntary consent to search; and (3) police officer had probable cause to justify search of potato chip bag contained in defendant's luggage.

Affirmed.

or order of, a practitioner while acting in the course of his professional practice, or except as otherwise authorized by this article.

While section 893.13(1)(f) of the Florida statute reads:

It is unlawful for any person to be in actual or constructive possession of a controlled substance unless such controlled substance was lawfully obtained from a practitioner or pursuant to a valid prescription or order of a practitioner while acting in the course of his professional practice....

9. § 775.021(1), Fla.Stat. (1993); *Griffith v. State*, 654 So.2d 936, 938 (Fla. 4th DCA 1995); *Helfant v. State*, 630 So.2d 672, 673 (Fla. 4th DCA 1995).

10. Fla.R.App.P. 9.030(a)(2)(A)(v).