IN THE SUPREME COURT OF FLORIDA

CASE NO.:88,774

THE STATE OF FLORIDA,

Petitioner,
-vs-

BURT MARSHALL,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW FROM
THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT

AMENDED ANSWER BRIEF OF RESPONDENT ON THE MERITS

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IN THE SUPREME COURT OF FLORIDA

CASE NO.88,774

THE STATE OF FLORIDA,

Petitioner,

-vs-

BURT MARSHALL,

Respondent.
_____/

AMENDED ANSWER BRIEF OF RESPONDENT ON THE MERITS

PRELIMINARY STATEMENT

The Respondent, BURT MARSHALL, herein may be referred to in this brief as "MARSHALL" and Respondent.

References to the District Court's record index on appeal will be referred to by the symbol (RI-page) with the appropriate page number inserted.

Respondent has included all portions of the record essential to his response to the State's initial brief in the attached appendix. Each exhibit contained in the appendix to this response will be referred to by the symbol "App." followed by the corresponding letter. Respondent will file under separate cover, with the appropriate notice of filing, the entire trial transcript, which will be designated with the symbol (TR-page number) in the response.

STATEMENT OF THE CASE AND FACTS

The Respondent was involved in a motorcycle accident on March 15, 1995, and subsequently charged by traffic citation with the offense of Driving Under the Influence. (App."A").

The first law enforcement officer on the scene was Monroe County Sheriff's Deputy Bobby Haynes. (TR-84), who observed the Respondent's motorcycle hanging upside down in the mangroves. (TR-84). At some point in time before the arrival of the Florida Highway Patrol, the Respondent was placed in Deputy Haynes' patrol car.

Upon arriving at the scene of the accident, Florida Highway Patrol Officer, Pedro Cortes, began to conduct an accident investigation. (TR-43). He first spoke with two witnesses at the scene and took their statements. (TR-44,46).

Trooper Cortes then had the Respondent exit from Deputy Haynes, patrol car, where he had been seated (TR-43) and initiated an accident investigation. (TR-50). The Trooper stated that he had concluded the accident investigation and then proceeded with the criminal investigation, (TR-50-53), yet never advised the Respondent of his Miranda 1 rights when he began the criminal investigation. The trooper stated "At that time, I asked Mr. Marshall if he had been drinking, (TR-53) and his reply was, yes, he had been drinking. At that time, I told him he was going to

1 Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

perform some field sobriety tests for me and he admitted, he told me yes, he'll do them." (TR-53). The trooper then had the Respondent perform field sobriety tests at roadside. (TR-55).

The trooper further testified "Okay. Well, I asked him to lift his leg six inches off the ground and look at his foot while he counts to 30, from one to 30. At that time Mr. Marshall started number 1, 2, 3, went up, then jumped to number 27, went back to 17, changed numbers around and he was lost." (TR-55)

The Respondent was arrested following the field sobriety tests for Driving Under the Influence, (TR-55) and he was transported to the Plantation Key Sheriff's Substation. From there he was taken into the DUI room of the Substation, where he was videotaped. (TR-56). The Respondent refused to perform the breath test or additional field sobriety tests. (TR-56). The Respondent was not advised of his Miranda rights until he was at the Plantation Key Sheriff's Substation. (TR-56).

The Respondent subsequently proceeded to trial and was found guilty of Driving Under the Influence by the jury On September 20, 1995. (TR-190). He was sentenced by Judge William R. Ptomey, Jr. on September 20, 1995, (TR-194-198).

On March 27, 1996, the Appellate Division of the Circuit Court of the Sixteenth Judicial Circuit in and for Monroe County, the Honorable Steven P. Shea presiding, ordered that the County Court's Judgment and Sentence was reversed and this case was remanded for further proceedings consistent herewith. ("App. B") The Order of

March 27, 1996, stated, that the trial court erred in allowing statements made by Respondent that were not voluntary or spontaneous, but in direct response to the officer's questions and without the benefit of Miranda warnings. On April 22, 1996 the circuit court entered an order denying the State's motion for reconsideration and affirmed the March 27, 1996 order. ("App. C") Subsequently, the State filed the petition for writ of certiorari on May 22, 1996. (RI-1-10).

On June 13, 1996, the Respondent filed a response to the State's Petition for Writ of Certiorari. (RI-13-27). The Third District rendered an opinion declining to follow the First District Court's State v. Riley, 617 So.2d 340 (Fla. 1st DCA 1993) decision and aligned itself with the Second District Court's decision in State v. Shepard, 658 So.2d 611 (Fla. 2nd DCA 1995) and denied certiorari. State v. Marshall, 21 Fla. L. Weekly D1865 (Fla. 3rd DCA August 14, 1996). (RI-28-38). On August 15, 1996 the State filed a notice invoking the Court's discretionary jurisdiction (RI-39-40), and motion to stay mandate of the District Court. (RI-41-42). On September 5, 1996, the Third District entered an order staying the mandate pending the resolution of the present case. (RI-44). This response to the State's initial brief follows.

ISSUE PRESENTED

WHETHER THE 1991 AMENDMENTS TO SECTION 316.066(4) FLORIDA STATUTES, THE "ACCIDENT REPORT PRIVILEGE" ELIMINATE THE REQUIREMENT THAT MIRANDA WARNINGS BE GIVEN TO A DRIVER ONCE A CRIMINAL INVESTIGATION BEGINS REGARDING THE ACCIDENT?

SUMMARY OF THE ARGUMENT

The 1991 Amendments to Fla. Stat. 316.066(4) did not eliminate the requirement that Miranda warnings be given to the driver at the commencement of the criminal investigation of the accident. State v. Marshall 21 Fla. L. Weekly D1865 (Fla. 3rd DCA August 14).

This rationale is consistent with the Second District Court's decision in State v. Shepard, 658 So.2d 611 (Fla. 2nd DCA 1995) and this Court's decision in State v. Norstrom, 613 So.2d 437 (Fla. 1993), and the opposite of the State's position and the First District court's decision in State v. Riley, 617 So.2d 340 (Fla. 1st DCA 1993).

Further, testimonial statements made during the field sobriety tests, were not admissible where the defendant was not given Miranda warnings, and the defendant was told to perform. Allred v. State, 622 So.2d 984 (Fla. 1993); State v. Shepard, 658 So.2d 611 (Fla. 2nd DCA 1995).

ARGUMENT

WHETHER THE 1991 AMENDMENTS TO SECTION 316.066(4) FLORIDA STATUTES, THE "ACCIDENT REPORT PRIVILEGE" ELIMINATE THE REQUIREMENT THAT MIRANDA WARNINGS BE GIVEN TO A DRIVER ONCE A CRIMINAL INVESTIGATION BEGINS REGARDING THE ACCIDENT?

The trial court did err when it permitted the Trooper to testify about incriminating statements made by the Respondent after he had concluded the accident investigation and then "changed hats" and commenced the criminal investigation because the Respondent was not then informed of his Miranda rights.

The Circuit Court and the Third District correctly concluded that the trial court erred when those statements were admitted over the Respondent's objections.

The Third District in State v. Marshall, 21 Fla. L. Weekly D1865 (Fla. 3rd DCA August 14, 1996) stated that the 1991 Amendment to Section 316.066(4), the accident report privilege, did not eliminate the requirement that Miranda warnings be given to the driver at the commencement of the criminal investigation of the accident.

Fla. Stat. 316.044(4) (1995) is commonly referred to as the accident report statute and it incorporated a provision prior to 1991 that was known as the accident report privilege. The statute was patterned after the Uniform Act Regulating Traffic on Highways by the National Conference on Commissions on Uniform State Laws. It was enacted to encourage drivers and those persons involved in

traffic accidents to speak freely without fear of self incrimination. See State v. Norstrom, 613 So.2d 437 (Fla. 1993); Lobree v. Caporossi, 139 So.2d 510 (Fla. 2nd DCA 1962).

Prior to the 1991 amendment Fla. Stat. 316.066(4) read:

> "Except as specified in this subsection, each accident report made by a person involved in an accident and any statement made by such person to a law enforcement officer for the purpose of completing an accident report required by this section shall be without prejudice to the individual so reporting. No such report or statement shall be used as evidence in any trial, civil or criminal...."

In 1991, the legislature amended the statute to include the new wording:

> However, subject to the applicable rules of evidence, a law enforcement officer at a criminal trial may testify as to any statement made to the officer by the person involved in the accident if that person's privilege against self-incrimination is not violated...."

This Court in State v. Norstrom, 613 So.2d 437,440-441 (Fla. 1993) interpreted the pre-1991 amendment to the accident report privilege to include the provision against self incrimination by stating:

> "....if any law enforcement officer gives any indication to a defendant that he or she must respond to questions concerning the investigation of an accident, there must be an express statement by the law enforcement official that 'this is now a criminal investigation', followed by Miranda warnings, before any statement by the defendant may be admitted."

According to Norstrom, once the criminal investigation begins, the Defendant is required to have Miranda warnings before his compelled statements will be admissible.

The Third District in Marshall recognized that there are certain exceptions to the requirement of Miranda warnings, and one such exception is the voluntary or spontaneous statement as in the case of State v. Perez, 630 So.2d 1231 (Fla. 2nd DCA 1994), where the Defendant upon exiting his car made an immediate statement in reference to an accident being his fault.

Another exception to the requirement of Miranda warnings, follows the Norstrom rationale, that if Miranda warnings are given to the defendant, and then the defendant makes incriminating statements, after the warnings, those statements are admissible, and the accident report privilege has been satisfied. Marshall.

However, what the State would have this Court adopt is the First District's interpretation of Fla Stat. 316.066(4), (1991), in State v. Riley, 617 So.2d 340 (Fla. 1st DCA 1993). However Riley eviscerates the accident report privilege and "changing hats" so that it no longer applies in accident cases and eliminates the protection of Fla. Stat. 316.066(4) (1995) against self incrimination during an accident investigation and subsequent criminal investigation. According to the State's argument there is no duty to give any additional information to an officer investigating a traffic accident other than that of name and age and date of birth.

In the present case, the Respondent was involved in a traffic accident. He was placed in the patrol car waiting for the appearance of the Florida Highway Patrol Trooper. When the Trooper arrived on the accident scene he spoke to the two witnesses first (TR-44) and then spoke to the Respondent for about ten minutes before beginning his criminal investigation. (TR-50-51). He had spoken to the Respondent and they had conversed as to the accident but then he "changed hats" and switched to the criminal investigation and did not warn the Respondent of his right against self incrimination, where before they had spoken freely.

But in following the State's argument, the driver should know that he can remain silent, at this stage. Any information deemed incriminating, the driver is not required to give, and should know that he is not required to provide that information. See State v. Marshall, 21 Fla. L. Weekly D1865 (Fla. 3rd DCA August 14, 1996).

Then the question becomes what is considered incriminating or testimonial. In order for a statement to be testimonial, the accused's communication must itself explicitly or implicitly relate a factual assertion or disclose information. Pennsylvania v. Muniz, 496 U.S. 582, 110 S.Ct. 2638, 110 L.Ed.2d 528 (1990); Allred v. State 622 So.2d 984 (Fla. 1993). Clearly, the question posed by the Trooper, "have you been drinking?" was designed to elicit such a factual assertion and the Respondent's answer to the question "Have you been drinking" was incriminating. It was used against him to help establish guilt.

The State also argues that the Courts have likened the routine traffic stop (including accidents) to an investigatory stop pursuant to Fla. Stat. 901.151, the Stop and Frisk statute, where an officer encounters a person under circumstances which reasonably indicate that such a person has committed, is committing, or is about to commit a violation of the criminal laws of this state... he may temporarily detain the person to ascertain his identity and the circumstances surrounding his presence abroad. Since the detention is short, no Miranda warnings are necessary according to State v. Taylor, 648 So.2d 701 (Fla. 1995); State v. Burns, 661 So.2d 847 (Fla. 5th DCA 1995).

This was not merely a brief or routine traffic stop as in the case of State v. Taylor, 648 So.2d 701 (Fla. 1995) or State v. Burns, 661 So.2d 847 (Fla. 5th DCA 1995), but an serious accident had occurred. The Respondent could not readily leave the scene because his motorcycle was hanging upside down in the mangroves. He was detained in the back seat of the Deputy's patrol car, waiting for the Florida Highway Patrol. Plus when the Trooper arrived he had to investigate the cause of the accident, speak to the witnesses, determine who was at fault, the speed, the conditions etc.

The position adopted by the Second District in State v. Shepard, 658 So.2d 611 (Fla. 2nd DCA 1995) and the Third District in State v. Marshall 21 Fla. L. Weekly D1865 (Fla. 3rd DCA August 14, 1996) is a much more reasonable approach to the accident report

privilege, when the Miranda warnings are required, and in line with this Court's opinion in State v. Norstrom, 613 So.2d 437 (Fla. 1993).

In Shepard the driver was involved in an accident and in response to questioning regarding the accident, by the deputy, she stated that, 'she was driving and had hit the person in the road.' She was then given Miranda warnings and told that the deputy was now conducting a criminal investigation for possible driving under the influence charges. She again repeated her statement and indicated that she had been drinking. Consequently, the Second District was faced with the question of what statements were admissible, and which ones were not, when Miranda warnings were given. The "operative event for the purposes of determining whether the statements are admissible is informing the defendant of his/her constitutional rights". The statements made after the Miranda warnings were admissible. Shepard.

In Marshall, the Third District stated that the legislature did not intend by its 1991 amendment to Fla. Stat. 316.066(4) to eliminate the requirement of Miranda warnings at the commencement of the criminal investigation regarding an accident.

The Trooper elicited further testimonial statements from the Respondent when he told him he was going to perform some field sobriety tests. (TR-53). The Respondent was not given a choice or advised of the consequences if he refused. (TR-53). The Trooper had him perform the counting and simultaneous leg lift sobriety tests

without the benefit of Miranda.

The Trooper testified "At that time Mr. Marshall started number 1, 2, 3, went up, then jumped to number 27, went back to 17, changed numbers around and he was lost." (TR-55).

No Miranda warnings are necessary according to State v. Taylor, 648 So.2d 701 (Fla. 1995) and State v. Burns, 661 So.2d 847 (Fla. 5th DCA 1995), because the tests are short, painless and non invasive, and the stop itself is of a short duration.

Yet in Allred v. State 622 So.2d 984 (Fla. 1993) this Court held that incorrect testimonial statements made during the field sobriety tests are not admissible without prior Miranda warnings because they are incriminating, not just because of the delivery but because the content of the answers support an inference that the mental faculties are confused. Allred.

In the present case, the Respondent's compulsory counting did lead to incorrect testimonial responses that were used against him at trial.

In State v. Shepard, 658 So.2d 611 (Fla. 2nd DCA 1995), the Second District concluded that a driver's response to the alphabet and counting portions of a field sobriety test was testimonial in nature and requires Miranda warnings to be given before the statements can be used in evidence. The statements made during the field side sobriety tests in Shepard were admissible because the driver had received her Miranda warnings before the administration of the field sobriety tests.

In the present case the Respondent was not advised of his constitutional right against self incrimination until after he was arrested and transported to the police substation. Therefore, the statements that were elicited by the Trooper, and those made during his field sobriety tests were inadmissible. Allred v. State 622 So.2d 984 (Fla. 1993); State v. Shepard, 658 So.2d 611 (Fla. 2nd DCA 1995).

The State's final argument, is that the 1991 amendment to Fla. Stat. 316.062, which imposes a duty to give information and render aid after an accident, added the wording:

> "The statutory duty of a person to make a report or give information to a law enforcement officer making a written report relating to an accident should not be construed as extending to information which would violate the privilege of such person against self incrimination." Sec. 316.062 (3);Ch 91-225, Sec. 13, Laws of Florida.

The additional wording in Fla. Stat. 316.062(3), according to the State, would also apply now to the 1991 amendment of Fla. Stat. 316.066(4). While there may be a duty to report an accident, there is not a duty to say anything when making the report. Marshall.

Yet this not a plausible argument. How would the driver make an accident report under Fla. Stat. 316.062, but remain silent. Or for that matter, how would the average driver know what would be considered incriminating, and when to remain silent. Under certain circumstances is required to give some biographical information, how does he differentiate what is incriminating. If the courts are in conflict over this issues, how can a driver understand when

he should speak and when he should remain silent. See Burns.

The reasonable conclusion is that the 1991 amendment to Fla. Stat. 316.062(3) does not apply to the 1991 amendment to 316.066(4). It applies solely to the duty to give information and render aid as set forth in Fla. Stat. 316.062. State v. Marshall 21 Fla. L. Weekly D1865 (Fla. 3rd DCA August 14, 1996).

In conclusion, the rational approach to the application of the 1991 amendment to section 316.066(4) would be that Miranda warnings are still required at the conclusion of the accident investigation and commencement of the criminal investigation. Marshall is a logical extension of the decisions in State v. Norstrom, 613 So.2d 437 (Fla. 1993) and State v. Shepard, 658 So.2d 611 (Fla. 2nd DCA 1995).

CONCLUSION

WHEREFORE, based on the foregoing reasons and authorities cited herein, Respondent respectfully submits that decision of the Third District Court be affirmed.

Respectfully Submitted,

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BY: _____
Laurie D. Hall, Esquire
Fla Bar No.:843954

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing AMENDED ANSWER BRIEF OF RESPONDENT ON THE MERITS was furnished by ( )hand delivery/ ( ) facsimile/ (✓) U.S. Mail to Ms. Fleur J. Lobree, Esquire, Assistant Attorney General, Office of the Attorney General, Department of Legal Affairs, 444 Brickell Avenue, Suite 950, Miami, Florida, 33131 this 6th day of January, 1997.

BY: _____
Laurie D. Hall
Fla Bar No.: 843954

IN THE SUPREME COURT OF FLORIDA

CASE NO.:88,774

THE STATE OF FLORIDA,

Petitioner,
-vs-

BURT MARSHALL,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW FROM
THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT

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AMENDED ANSWER BRIEF OF RESPONDENT ON THE MERITS

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APPENDIX "A"

FLORIDA DUI UNIFORM TRAFFIC CITATION 051987-J CHECK DIGIT 1

COUNTY OF Monroe CITY (IF APPLICABLE) 502573

(1) F.H.P. ☐ (2) P.D. ☐ (3) S.O. ☐ (4) OTHER

FLORIDA HIGHWAY PATROL
AGENCY

IN THE COURT DESIGNATED BELOW THE UNDERSIGNED CERTIFIES THAT HE/SHE HAS JUST AND REASONABLE GROUNDS TO BELIEVE AND DOES BELIEVE THAT ON

COMPLAINT
(RETAINED BY COURT)

DAY OF WEEK	MONTH	DAY	YEAR	TIME
FRI	03	15	95	11:45 ☐ AM ☑ PM

NAME (PRINT) FIRST Burt MIDDLE Marshall LAST

STREET IF DIFFERENT THAN ONE ON DRIVER LICENSE "X" HERE ☐

CITY STATE ZIP CODE

TELEPHONE NUMBER ( ) DATE OF BIRTH MO DAY YR RACE W SEX M HGT 60

DRIVER LICENSE NUMBER	STATE	CLASS	RESTRICT	ENDORSE	YR LIC EXP
	CA	OD			1998

YR VEHICLE	MAKE	STYLE	COLOR	IF COMMERCIAL MTR VEH "X" HERE
1992	HARL	M/C	Blue	☐

VEHICLE LICENSE NO.	STATE	YEAR TAG EXPIRES	IF PLACARDED HAZARDOUS MATERIAL "X" HERE
04599V	FL	1995	☐

UPON A PUBLIC STREET OR HIGHWAY OR OTHER LOCATION, NAMELY
SR-5 mm 70

FT ____ MILES ____ ☐ N ☐ S ☐ E ☐ W OF NODE ____ IF COMPANION CITATION(S) "X" HERE ☐

DID UNLAWFULLY COMMIT THE OFFENSE OF DRIVING UNDER THE INFLUENCE OF ALCOHOLIC BEVERAGES, CHEMICAL OR CONTROLLED SUBSTANCES; DRIVING/ACTUAL PHYSICAL CONTROL WHILE IMPAIRED, OR DRIVING/ACTUAL PHYSICAL CONTROL WITH UNLAWFUL BLOOD ALCOHOL LEVEL OF .08 PERCENT OR ABOVE. BLOOD ALCOHOL LEVEL Refused %.

COMMENTS PERTAINING TO OFFENSE (Only one offense each citation)

☒ STATE STATUTE SECTION 316.193 SUB-SECTION

CRASH	DAMAGE TO OTHER PROPERTY	INJURY TO ANOTHER	SERIOUS BODILY INJURY TO ANOTHER	FATAL
☒ YES ☐ NO	☒ YES $ 4000.00 ☐ NO	☐ YES ☒ NO	☐ YES ☒ NO	☐ YES ☒ NO

THIS IS A CRIMINAL VIOLATION, COURT APPEARANCE REQUIRED, AS INDICATED BELOW.

04-05-95 8:30 am 051987-J CHECK DIGIT 1
COURT DATE TIME

County Court
COURT AND LOCATION

Plantation Key Mm 89

ARREST DELIVERED TO Sheriff at Jail Plantation Key DATE 03-16-95

I AGREE AND PROMISE TO COMPLY AND ANSWER TO THE CHARGES AND INSTRUCTIONS SPECIFIED IN THIS CITATION. WILLFUL REFUSAL TO ACCEPT AND SIGN THE CITATION MAY RESULT IN ARREST. I UNDERSTAND MY SIGNATURE IS NOT AN ADMISSION OF GUILT OR WAIVER OF RIGHTS. IF YOU NEED REASONABLE PRIORITY ACCOMMODATIONS TO COMPLY WITH THIS CITATION, CONTACT THE CLERK OF THE COURT.

X [signature] SIGNATURE OF DEFENDANT

EFFECTIVE THE DATE OF ARREST, YOUR DRIVING PRIVILEGE IS SUSPENDED/DISQUALIFIED FOR:

☐ DRIVING WITH AN UNLAWFUL BLOOD ALCOHOL LEVEL. THIS SUSPENSION/DISQUALIFICATION IS FOR A PERIOD OF SIX MONTHS IF THIS IS THE FIRST VIOLATION OF DRIVING WITH UNLAWFUL BLOOD ALCOHOL LEVEL OR ONE YEAR IF PREVIOUSLY SUSPENDED OR DISQUALIFIED FOR DRIVING WITH AN UNLAWFUL BLOOD ALCOHOL LEVEL. WHEN OPERATING A CMV, YOUR COMMERCIAL DRIVER LICENSE/PRIVILEGE WILL ALSO BE DISQUALIFIED FOR THE SAME PERIOD OF TIME AS THE SUSPENSION.

☒ REFUSAL TO SUBMIT TO LAWFUL BREATH, BLOOD OR URINE TEST F.S. 322.2615. THIS SUSPENSION IS FOR A PERIOD OF ONE YEAR IF THIS IS FIRST REFUSAL OR 18 MONTHS IF PREVIOUSLY SUSPENDED FOR THIS OFFENSE. WHEN OPERATING A CMV, YOUR COMMERCIAL DRIVER LICENSE/PRIVILEGE WILL ALSO BE DISQUALIFIED FOR A PERIOD OF ONE YEAR FOR A FIRST REFUSAL OR PERMANENTLY FOR A SECOND REFUSAL WHILE OPERATING A CMV.

LICENSE SURRENDERED? ☒ YES ☐ NO REASON ____

ELIGIBLE FOR PERMIT? ☐ YES ☒ NO REASON Refused BAC

UNLESS INELIGIBLE, THIS CITATION SHALL SERVE AS A TEMPORARY DRIVER LICENSE AND WILL EXPIRE AT MIDNIGHT ON THE 7TH DAY FOLLOWING THE DATE OF ARREST.

AT THE Miami DRIVER IMPROVEMENT HEARING OFFICE. YOU MAY REQUEST, WITHIN 10 DAYS AFTER THE DATE OF ARREST, A REVIEW OF SUSPENSION BY THE DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES. SEE REVERSE SIDE.

RANK — SIGNATURE OF OFFICER	BADGE NO.	ID. NO.	TROOP UNIT
Trooper Pedro Cat Cortes	2044	1430	E

HSMV 75903 (Rev. 10/93)

C

APPENDIX "B"

Laurie Hall

IN THE CIRCUIT COURT OF THE 16TH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA IN AND FOR MONROE COUNTY

BURT MARSHALL,

Defendant/Appellant,

vs.

APPEAL CASE NO. MR 95-30163 CFA
APPEAL FROM COUNTY COURT
CASE NO. PK 95-2573 TT

STATE OF FLORIDA,

Plaintiff/Appellee.
_____/

ORDER ON APPEAL

THIS CAUSE came on to be heard on the Appeal of BURT MARSHALL from a conviction after a jury trial. The Defendant was charged by Information with Driving Under The Influence in violation of F.S. 316.193. The Defendant was found guilty by the Jury of DUI.

This Court will first address the second issue raised by Defendant on appeal in that the trial court erred in denying Defendant's Motion for Judgment of Acquittal. In reviewing the transcript, testimony and evidence in the light most favorable to the State, which is the standard the court must utilize to determine the motion, this Court does not find that the Trial Court erred in denying the Motion for Judgment of Acquittal.

The first issue raised by the Appellant is the argument that the Trial Court erred in admitting privileged statements made by Appellant to the arresting officer prior to his arrest, and that this error constituted reversible error.

This Court notes that it directed counsel to supplement their initial appellate briefs to address the applicability of the Supreme Court case of State v. Norstrom, 613 So.2d 437 (Fla. 1993) and the second district case of State v. Shepard, 658 So.2d 611 (2 Dist. 1995). Appellant has filed his supplemental brief, yet the State failed to observe this Court's directive and no supplemental brief has been received from the State.

The State's argues that Appellant's statements to the police did not fall within the scope of the accident report privilege since the Appellant was not in custody when he made those statements. However, this case involves the privilege pursuant to F.S. 316.066. As stated in Norstrom, supra, by the Florida Supreme Court:

> "To clarify our decision, we emphasize that the privilege granted under section 316.066 is applicable if no *Miranda* warnings are given. Further, if a law enforcement officer gives any indication to a defendant that he or she must respond to questions concerning the investigation of an accident, there must be an express statement by the law enforcement official to the defendant that "this is now a criminal investigation" followed **immediately** by *Miranda* warnings, before any statement by the defendant may be admitted." (at page 440-441. Emphasis mine).

In State v. Shepard, 658 So.2d 611,612 (2 Dist. 1995), the court interpreted Norstrom as well as the 1991 amendment to 316.066 as follows:

> "We affirm that portion of the trial court's order suppressing statements made during the accident investigation conducted by Officer Kamp and the initial statements made to Deputy Watts. (Citation omitted). However, the statements made to Watts after he had been given appellee *Miranda* warnings are admissible. In State v. Norstrom, 613 So.2d 437 (Fla. 1993), the supreme court held that statements made after a motorist has been given *Miranda* warnings are admissible as evidence in a subsequent prosecution. Such statements may be used if made in either the accident or the criminal stage of the investigation. **The operative event for purposes of determining whether the statements are admissible is informing the defendant or his/her constitutional rights.**" (Emphasis mine).

It is important to note that the driver who was questioned in Shepard was not in custody

at the time she was being examined regarding the accident. The Shepard court did not reach the same interpretation of Norstrom as the court in State v. Riley, 617 So.2d 340 (1 Dist. 1993). The Court in Riley ruled that the trial court must review the facts in order to determine whether a violation of defendant's constitutional rights has occurred. Such a review did not occur in the instant case. The trial court in the instant case focused primarily on the commencement of the criminal investigation, and despite defense counsel's concerns, no query was made during the voir dire of the officer outside the presence of the jury relative to a possible violation of the Appellant's constitutional rights. The Supreme Court in Norstrom and the court in Shepard make it perfectly clear that failure to provide notice to the party of his/her rights pursuant to *Miranda* will render the statements inadmissible, regardless of whether the person was in custody or not. This Court concurs with Shepard's interpretation of Norstrom. The court in Riley does admit that the existence or lack of custodial interrogation is only one factor in the case by case determination.

In the instant case, the record is clear that the police officer did not give the Appellant his *Miranda* rights until some time later at the police station. It is further apparent that defense counsel objected to any testimony of the officer as to statements made by the Defendant without *Miranda* being given. It is apparent from the above cases that the operative event for purposes of admissibility is whether the Appellant was informed of his *Miranda* warnings. After the police officer smelled the alcohol on the Appellant's breath, advised him of the conclusion of his accident investigation and the commencement of the criminal investigation, the officer was required to give the Appellant his constitutional rights in order for the privilege to terminate. He did not do so, and the privilege remained in effect until the rights were given. The statements made by Appellant were not voluntary or spontaneous, but was in direct response to the officer's question as to

whether he had been drinking. The Trial Court overruled Appellant's objections to the admissibility of the statements given, and this Court finds the trial court's ruling was not harmless error.

For the above reasons, it is

ORDERED AND ADJUDGED that the Judgment and Sentence of Burt Marshall for Driving Under the Influence is hereby reversed and this case is remanded for further proceedings consistent herewith.

DONE AND ORDERED in Chambers at Plantation Key, Monroe County, Florida, this 27th day of March, 1996.

STEVEN P. SHEA
CIRCUIT JUDGE

copies to:

Laurie Hall, Esq.
Robert B. Shillinger, Esq.
Hon. Reagan Ptomey, County Judge

APPENDIX "C"

IN THE CIRCUIT COURT OF THE 16TH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA IN & FOR MONROE COUNTY

BURT MARSHALL,

Defendant/Appellant,

vs.

Appeal No. PK 95-30163-AP
Case No. PK-95-2573-TT

STATE OF FLORIDA,

Appellee.

_____/

ORDER ON STATE'S MOTION FOR RECONSIDERATION

THIS CAUSE, having come before the Court on the State's Motion for Reconsideration, and the Court reviewing the Appellee's Supplemental Memorandum of Law which had not been previously furnished to the Court, and reviewing the motion, the file, and the applicable law, finds as follows:

1. The State's Supplemental Memorandum was apparently timely filed on March 7, 1996, however no courtesy copy was provided to the Court and the March 7,1996 memorandum filed with the Clerk was not provided to the Court subsequent to filing.

2. The Court will grant the State's Motion for Reconsideration to the extent that the Court has reviewed its Supplemental Memorandum and finds as follows:

3. The State argues that caselaw relied upon by the Court is not applicable. Contrary to the State's argument, State v. Shepard, 658 So.2d 611 (Fla. 2nd DCA 1995), was decided on July 19, 1995, was numbered 94-03833 in the appellate court, and apparently the alleged incident occurred and the original case tried well after the 1991 amendments to F.S. 316.066(4). The State does admit that Shepard does not affirmatively state that the decision is based on the pre-1991 amendment. Appellee asserts that this Court erred in considering Shepard as well as State v. Norstrom, 613 So.2d 437 (Fla. 1993), in rendering its Order On Appeal dated March 27, 1996. This Court disagrees with the State. Even the case substantially relied upon by the prosecution, State v. Riley, 617 So.2d 340 (Fla. 1st DCA 1993), relied upon Norstrom, and quotes that case as follows:

> "According to the *Norstrom* court, the purpose of the statutory privilege under section 316.066(4) is "to ensure that accident information could be compelled without Fifth Amendment violations."

4. As stated in Shepard:

"The operative event for purposes of determining whether the statements are admissible is informing the defendant of his/her constitutional rights."

5. For the foregoing reasons, and the reasons set forth in this Court's Order On Appeal dated March 27, 1996, which Order and reasons set forth therein are incorporated in this Order, it is

ORDERED AND ADJUDGED that the Judgment and Sentence of Burt Marshall for Driving under the Influence is hereby reversed and this case is remanded for further proceedings consistent herein.

DONE AND ORDERED, in Chambers at Plantation Key, Monroe County, Florida, this 22nd day of April, 1996.

STEVEN P. SHEA
CIRCUIT JUDGE

Copies provided to:

Robert B. Shillinger, Esq., Asst. State Attorney
Laurie D. Hall, Esq., Defense Counsel
Hon. Reagan Ptomey, County Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing INDEX TO APPENDIX OF AMENDED ANSWER BRIEF OF RESPONDENT ON THE MERITS was furnished by ( )hand delivery/ ( ) facsimile/ (✓) U.S. Mail to Ms. Fleur J. Lobree, Esquire, Assistant Attorney General, Office of the Attorney General, Department of Legal Affairs, 444 Brickell Avenue, Suite 950, Miami, Florida, 33131 this 6th day of January, 1997.

BY: _____
Laurie D. Hall
Fla Bar No.: 843954