IN THE SUPREME COURT OF FLORIDA

FILED
SID J. WHITE
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CLERK, SUPREME COURT
By Chief Deputy Clerk

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

INITIAL BRIEF OF PETITIONER ON THE MERITS

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

FLEUR J. LOBREE
Assistant Attorney General
Florida Bar No. 0947090
Office of the Attorney General
Department of Legal Affairs
444 Brickell Avenue, Suite 950
Miami, Florida 33131
(305) 377-5441
fax 377-5655

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INTRODUCTION

This is a petition for discretionary review of an opinion of the District Court of Appeal of Florida, Third District, (hereinafter "Third District"), denying a petition for writ of certiorari. Petitioner, THE STATE OF FLORIDA, was the prosecution in the trial court, Appellee in the Sixteenth Judicial Circuit Court of Florida and Petitioner in the District Court of Appeal of Florida, Third District. Respondent, BURT MARSHALL, was the defendant in the trial court, Appellant in the Sixteenth Judicial Circuit Court of Florida, and Respondent in the District Court of Appeal. The parties shall be referred to as they stand before this Court.

The symbol "T." designates the transcript of the trial court proceedings, the symbol "R." designates the record on appeal before this Court, and the symbol "App." followed by a letter designates exhibits contained in the appendix to the petition for writ of certiorari.

STATEMENT OF THE CASE AND FACTS

On March 15, 1995, Respondent, BURT MARSHALL, was involved in a motor cycle accident and arrested for driving under the influence (hereinafter "DUI"). (App. A). On April 4, 1995, Respondent was charged by information with DUI, in violation of § 316.193, Fla. Stat. (1995). (App. B). On September 20, 1995, Respondent proceeded to a trial by jury before the Honorable Reagan Ptomey, County Judge. (App. C).

Florida Highway Patrol Officer Pedro Cortes testified that he arrived at the scene of the accident and conducted an investigation. (T. 2-3). Trooper Cortes had Respondent perform roadside field sobriety tests and arrested him for DUI. (T. 2-3). Trooper Cortes testified that Respondent made admissions to him about drinking that night at the very beginning of his criminal investigation, a mere 10 minutes after Trooper Cortes first spoke to Respondent. (T. 46, 53). Counsel for Respondent objected and argued that Respondent's admissions to Trooper Cortes that he had been drinking that night were inadmissible under the accident report privilege. (T. 46, 54).

Trooper Cortes testified that at some point he advised Respondent that he was beginning a criminal investigation. (T. 53).

Trooper Cortes smelled a strong odor of an alcoholic beverage coming from Respondent's breath. He testified, "At the time, I asked [Respondent] if he had been drinking and his reply was, yes, he had been drinking. At that time, I told him he was going to perform some field sobriety tests for me and he admitted, he told me yes, he'll do them." (T. 53). Trooper Cortes then 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 [Respondent] started number 1, 2, 3, went up, then jumped to number 27, went back to 17, changed numbers around and he was lost. He couldn't keep his balance. He almost went to the floor, and if it wasn't for, Deputy Haynes had to hold him before he fell down." (T. 55). Respondent failed the roadside tests and was arrested. (T. 55). Respondent was transported to the Plantation Key Sheriff's Substation and taken to the DUI room, where he was videotaped. (T. 3, 56-57). Respondent refused to perform a breath test or additional field sobriety tests. (T. 3).

At the conclusion of trial, the jury returned a verdict of guilty of DUI, and Respondent was adjudicated guilty and sentenced to a term of twelve months probation, six month license suspension, and a fine of $500.00 and court costs of $500.00. (App. C; App. D;

App. E). On October 2, 1995, counsel for Respondent filed a timely notice of appeal. (App. F).

On March 29, 1996, the Circuit Court entered an order on appeal, finding that the trial court correctly denied Respondent's motion for judgment of acquittal but erred by admitting statements made by Respondent to a police officer where he had not been apprised of his Miranda[1] rights. (App. F). On April 1, 1996, the State filed a motion for reconsideration, arguing that the authorities upon which the Order on Appeal was based did not apply because they interpreted the pre-1991 version of § 316.066(4), Fla. Stat. (App. G). On April 22, 1996, the Circuit Court entered an order on the State's motion for reconsideration and again found that the statements were not admissible where Respondent was not informed of his constitutional rights. (App. H). The judgment and sentence of the trial court was therefore reversed, and the case was remanded for a new trial. (App. H).

On May 22, 1996, the State filed a petition for writ of certiorari in the Third District, again arguing that Respondent's statements to Trooper Cortes were not privileged and were properly admitted at trial. (R. 1-10). Petitioner maintained that Respondent

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

was not in custody at the time of his statements and that the 1991 amendment to the accident report privilege of § 316.066(4), Fla. Stat. rendered the voluntary statements he made to Trooper Cortes admissible. (R. 1-10). Petitioner relied upon the authority of State v. Riley, 617 So. 2d 340 (Fla. 1st DCA 1993), and argued that the authorities relied upon by the Circuit Court did not control as they interpreted the pre-1991 version of § 316.066(4). (R. 1-10).

On June 14, 1996, Respondent filed a response to the petition for writ of certiorari. (R. 13-27). Following oral argument, on August 14, 1996, the Third District entered an opinion declining to follow Riley and denying certiorari. (R. 13-27). State v. Marshall, 21 Fla. L. Weekly D1865 (Fla. 3d DCA June 14, 1996). On August 15, 1996, the State filed a notice invoking this Court's discretionary jurisdiction and a motion to stay the mandate of the District Court. (R. 39-42). On September 5, 1996, the Third District entered an order staying its mandate pending disposition of this case. (R. 44). This brief follows.

QUESTION PRESENTED

WHETHER THE 1991 AMENDMENTS TO THE ACCIDENT REPORT PRIVILEGE OF CHAPTER 316, FLORIDA STATUTES, RENDERED RESPONDENT'S VOLUNTARY STATEMENTS TO AN OFFICER CONDUCTING A CRIMINAL INVESTIGATION ADMISSIBLE AT TRIAL, WHERE RESPONDENT WAS NOT READ HIS *MIRANDA* RIGHTS BUT WAS NOT IN CUSTODY?

SUMMARY OF THE ARGUMENT

Respondent made damaging admissions to the police at the scene of a routine traffic accident investigation prior to his arrest for DUI. He was not is custody or otherwise compelled to answer the officer's questions. Therefore, the trial court properly allowed the admission of these statements, even though the officer did not read Miranda warnings. The 1991 amendments to the accident report privilege of Chapter 316, Florida Statutes, did not act to merely codify the fact that a defendant may waive the accident report privilege, like the privilege against self-incrimination, after being apprised of his constitutional rights. Rather, the privilege was amended to confirm that a driver involved in an accident has no statutory duty to give a statement or any information to an officer which may be self-incriminating. As an officer may question a driver following a traffic stop or other temporary investigative detention without first reading Miranda warnings, his questioning of a driver at an accident scene should not be sufficient, standing alone, to constitute custodial interrogation. Because Respondent was not in custody at the time he made the statements at issue herein, the lower courts erred by determining that they should be excluded pursuant to the accident report privilege.

ARGUMENT

THE 1991 AMENDMENTS TO THE ACCIDENT REPORT PRIVILEGE OF CHAPTER 316, FLORIDA STATUTES, RENDERED RESPONDENT'S VOLUNTARY STATEMENTS TO AN OFFICER CONDUCTING A CRIMINAL INVESTIGATION ADMISSIBLE AT TRIAL, WHERE HE WAS NOT READ HIS *MIRANDA* RIGHTS BUT WAS NOT IN CUSTODY.

Respondent's statements to Trooper Cortes prior to his arrest were not privileged and therefore the lower courts erred by finding that the trial court erroneously permitted Trooper Cortes to recount those statements for the jury. Respondent's damaging admissions did not fall within the scope of statements protected by either the accident report privilege or the privilege against self-incrimination under the United States and Florida Constitutions, because Respondent was not compelled to speak or in custody at the time he made the admissions.

Respondent argued below that his admissions to Trooper Cortes that he had been drinking that night were inadmissible under the accident report privilege of § 316.066(4), Fla. Stat. (1995). (T. 46, 54). However, the accident report privilege protects a defendant from having compelled statements made during an accident investigation from being introduced against him at trial. State v. Riley, 617 So. 2d 340, 342 (Fla. 1st DCA 1993) (quoting Brackin v. Boles, 452 So. 2d 540, 544 (Fla. 1984)). The statements made by

Respondent in this case were not compelled as he was not told that he had to answer the officer's questions and he was not in custody during the brief roadside investigation.

The accident report privilege is codified at § 316.066(4), Fla. Stat. (1995), which states:

> 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 shall be used as evidence in a trial, civil or criminal. *However, subject to the applicable rules of evidence, a law enforcement officer in a criminal trial may testify 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.*

(emphasis added). The 1991 amendment to this section, which added the italicized language above, was effected by ch. 91-255, § 14, Laws of Florida. The same session law also added subsection (3) to section 316.062, Fla. Stat.:

> 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 shall not be construed as extending to information which would violate the privilege of such person against self-incrimination.

ch. 91-255, § 13, Laws of Florida.

These amendments were later explained in Riley:

> Pursuant to the 1991 amendments, no driver is now compelled by statutory requirement to give incriminating information to a law enforcement officer investigating a traffic accident. An officer may now testify to statements that are voluntarily made by a driver and that have not been obtained in violation of Fifth Amendment protections.... The driver who is under investigation, but not in custody so as to trigger rights pursuant to Miranda, now has the same protection, no more and no less, as anyone else suspected of criminal activity. The Fifth Amendment is not of necessity implicated by roadside questioning of a driver by an officer following a traffic stop.

Riley, 617 So. 2d at 343 (citing Berkemer v. McCarthy, 468 U.S. 420, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984)).

While a trial court "must closely examine the facts in order to determine whether a driver's constitutional rights have been violated by custodial interrogation or otherwise," Riley, 617 So. 2d at 343, a defendant must bring forth evidence to demonstrate that the was subjected to any restraints comparable to those found in a formal arrest in order to establish a violation of his Fifth Amendment right against self-incrimination as well as his similar rights under Section 9 of the Florida Constitution. Traylor v. State, 596 So. 2d 957 (Fla. 1992); State v. Burns, 661 So. 2d 842, 844-845 (Fla. 5th DCA 1995), rev. dismissed 676 So. 2d 1366 (Fla.

1996).[2] Examples of such evidence include the duration of the stop, whether the location of the stop was a public or private area, the number of officers present, and the relative complexity of the field sobriety tests. Id. at 844.

At a normal traffic accident investigation it is not unusual for the police work to take one half an hour or, under some circumstances, several hours. An accident investigation, depending on the individual circumstances, may involve anywhere from one officer to several officers or several police agencies. The vast majority of accident investigations never result in a formal arrest. In fact, in 1994 in Florida there were 325,232 drivers involved in crashes, compared to 24,987 alcohol-related crashes. Traffic Crash Facts, 1994, DHSMV, July 1995 DHSMV printshop. There were 62,152 drivers arrested for DUI during that same period of time, however, the vast majority were not involved in a crash. Uniform Citation Statistical Report, p. 63, DHSMV Division of Driver's License, Bureau of Records, June 1995. Therefore, a

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[2] This Court has defined custody under the Florida Constitution almost identically to the federal definition. Traylor, 596 So. 2d 957, 987 n.16 (Fla. 1992) (referring to an "actual" arrest rather than a "formal" arrest); see also Allred v. State, 622 So. 2d 984, 987 (Fla. 1994).

routine accident investigation, in and of itself, should not be deemed the equivalent of "custody" or an arrest.

At trial in the instant case, Respondent produced no evidence that would indicate that he was in custody during the accident investigation at the time he answered questions or performed roadside tests. In fact, Respondent made admissions about drinking that night to Trooper Cortes, the only officer at the scene, at the very beginning of the criminal investigation, a mere ten minutes after Trooper Cortes first spoke to him. (T. 46, 53). Furthermore, the record is devoid of any evidence which would indicate that Respondent was subject to any greater restraints than those imposed on a typical DUI suspect, as Trooper Cortes was the only officer who spoke to him at the scene during the routine accident investigation.

Because Respondent produced no evidence to demonstrate that his "freedom of action [was] curtailed to a 'degree associated with formal arrest,'" when he was asked whether he had been drinking, he was not entitled to Miranda warnings. See Burns, 661 So. 2d at 845 (quoting Berkemer, 468 U.S. at 440, 104 S.Ct. at 3150, quoting California v. Beheler, 463 U.S. 1121, 1125, 103 S.Ct. 3517, 3520, 77 L.Ed.2d 1275, 1279 (1983)). Accordingly, Respondent's admission that he had been drinking alcohol that night before the accident

was not privileged and thus was properly admitted along with any other statements Respondent made at the scene that night. Burns, 661 So. 2d at 845.

Similar analysis applies to Respondent's contention that his counting out loud as a part of a particular field sobriety test was allegedly conducted in violation of his rights under Miranda. Since Respondent was not in custody at the time he performed the field sobriety tests and because he produced no evidence to show that he was subject to any greater restraints than those imposed on a typical DUI suspect, he was not entitled to Miranda warnings and his statements were admissible against him. Moreover, this Court's holding in State v. Allred provided no assistance to Respondent because that case, unlike the case at issue, clearly involved the statements of a person who had already been arrested. Allred, 622 So. 2d 984, 987 (Fla. 1993).

The authorities relied upon by the lower courts in their orders on appeal, State v. Norstrom, 613 So. 2d 437 (Fla. 1993) and State v. Shepard, 658 So. 2d 611 (Fla. 2d DCA 1995), do not directly address the issue raised in this case because neither decision interpreted the amended version of the accident report privilege statute. Although the decision in Norstrom was rendered in 1993, it involved an accident that occurred on March 25, 1988.

Norstrom, 613 So. 2d at 438. Accordingly, in Norstrom, this Court dealt with the pre-1991 version of section 316.066(4). Riley, 617 So. 2d at 343. In fact, this Court's quotation of what it termed the "pertinent part of section 316.066" did not include the above-quoted language which was added by the legislature in 1991. Norstrom, 613 So. 2d at 439-440.

While it is conceded that Norstrom may be controlling authority with respect to the pre-1991 version of the accident report privilege, the Court's decision did not interpret the 1991 amendments to § 316.066(4), Fla. Stat., and therefore should not be controlling authority with respect to any case involving questioning during an accident investigation that has taken place after the effective date of the amendment. Since the events that brought forth the instant case took place close to four years after the statute was amended, Norstrom should not control the outcome here.

Similarly, the Shepard decision also did not discuss the effects of the 1991 amendments to the accident report privilege. In Shepard, the Second District relied on its prior decision in Perez v. State, 630 So. 2d 1231 (Fla. 2d DCA 1994), in affirming the trial court's suppression of a DUI defendant's statements to an officer during an accident investigation. Shepard, 658 So. 2d at

612. While the Shepard decision never identified which version of the statute that it was applying, the Court specifically relied on Perez -- and only Perez -- as the legal authority for its conclusion that the operative event for determining the applicability of the accident report privilege was the giving of Miranda warnings. Shepard, 658 So. 2d at 612.

The Shepard court's reliance on Perez is significant since the Perez Court specifically relied on the pre-1991 version of § 316.066(4), Fla. Stat. in reaching their decision. Although Perez cites to the 1991 version of § 316.066(4), Fla. Stat., the decision quotes the text of the section without referring to the italicized language above which was added to the section by ch. 91-255, Laws of Fla. Perez, 630 So. 2d at 1231, n.2. Moreover, it is clear that the Perez court (and consequently the Shepard court), did not consider the amended version of § 316.066(4), Fla. Stat., as Perez stated that the "accident report privilege confers confidentiality upon ***any admission*** a driver makes in compliance with the statutory duty to report that which occurred in the accident." Perez, 630 So. 2d at 1332 (emphasis added) (citing Brackin v. Boles, 452 So. 2d 540 (Fla. 1984)). As such, the Third District erred in this case by declining to follow Riley, and instead applying the analyses of Shepard and Norstrom.

Because of the 1991 amendment, "an officer may now testify to statements that are voluntarily made by a driver and that have not been obtained in violation of Fifth Amendment protections." Riley, 617 So. 2d at 343. It is clear from the dicta in Perez quoted above that the Second District did not acknowledge the 1991 amendment to § 316.066(4), Fla. Stat. which, as explained in Riley, effectively eliminated the accident report privilege in criminal cases provided that the defendant's 5th Amendment rights against self-incrimination are not violated. Riley, 617 So. 2d at 343; see also Erhardt, Florida Evidence § 501.2 at p. 238 (1996 Edition).

In deciding to deny certiorari in this case, the Third District noted that this Court in Norstrom "reasoned that the sole purpose of the accident report privilege is to protect the privilege against self-incrimination." State v. Marshall, 21 Fla. L. Weekly D1865 (Fla. 3d DCA June 14, 1996). The court therefore determined that the legislature amended § 316.066(4) to create a limited exception to the accident report privilege in criminal cases ala Norstrom, where a defendant clearly waives his Fifth Amendment privilege. Id. at D1866. This position is not supported by the legislative history, including the staff analysis of H.B. 91-255.

The State acknowledges that key question at issue in this case, in light of both Norstrom and the 1991 amendments to § 316.062(3) and 316.066(4), Fla. Stat., is whether Respondent's statements were obtained in violation of his Fifth Amendment rights against self-incrimination. However, the State insists that in answering this question, it is important to note that "the Fifth Amendment is not of necessity implicated by roadside questioning of a driver by an officer following a traffic stop." Riley, 617 So. 2d at 343 (quoting Berkemer v. McCarthy, 468 U.S. 420, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984). Moreover, "Miranda warnings are required only when a defendant is subjected to custodial interrogation." State v. Burns, 661 So. 2d at 844 (citing Roberts v. United States, 445 U.S. 552, 560, 100 S. Ct. 1358, 1364, 63 L.Ed.2d 622 (1980); Arbalaez v. State, 626 So. 2d 169 (Fla. 1993); and Traylor v. State, 596 So. 2d 957 (Fla. 1992)).

The mere investigation of a crash scene or a preliminary non-custodial criminal investigation does not, in and of itself, establish "custody" even though a suspect may be temporarily and reasonably detained at the crash site prior to being taken into custody. The United States Supreme Court has disapproved "any general proposition that custody exists whenever motorists think that their freedom of action has been restricted, for such a

rational would eviscerate Berkemer altogether." Pennsylvania v. Brurder, 488 U.S. 9, 109 S.Ct. 205, 207 n.2 (1988). This Court has even held that a person is not in "custody" for Miranda purposes when his person is temporarily seized pursuant to a search warrant to seize blood and saliva samples. Taylor v. State, 630 So. 2d 1038 (Fla. 1993).

"The relevant question is how a reasonable man in the suspect's position would have understood his situation." Casso v. State, 524 So. 2d 422, 423 (Fla.), cert. denied, 488 U.S. 870, 109 S.Ct. 178 (1988). In this case, there was no showing that Respondent "reasonably believed that his freedom of action was 'curtailed to a degree associated with formal actual arrest.'" when he made the statements to Trooper Cortes which he claims were privileged. See Burns, 661 So. 2d at 844. Nor did Respondent "bring forth any evidence that he was subjected to any restraints comparable to those found in a formal arrest" at the time he made those statements. Id.

Unless this Court finds that Respondent was "in custody to the degree associated with actual or formal arrest," the statements made were properly deemed admissible at his criminal trial through the testimony of Officer Cortes, because the 1991 amendments clearly limited the accident report privilege for that purpose. A

privilege in Florida is no longer a creature of judicial decision, but must be recognized by Florida Rules of Criminal Procedure, statute, or the Constitutions of Florida or the United States. Statutory privileges should be strictly construed. State v. Mitchell, 245 So. 2d 618 (Fla. 1971). The legislature has the authority to limit or abrogate statutory privileges that it previously created. Erhardt, Florida Evidence § 501.1, at p. 234 (1996 Edition).

An examination of the legislative history surrounding the accident report privilege since its inception helps to clarify the legislative intent in amending and limiting such in 1991. A lengthy history of the accident report privilege, from the time of its enactment in 1941 to its amendment in 1991, is contained in the article The Accident Report Privilege, Going, Going, Gone, R.W. Evans, 66 Fla. B.J. 12 (March 1992). Notably, in 1969 the legislature relieved a driver of almost any duty to submit a written report, as an investigating officer was required to submit an accident report for any motor vehicle accident involving death, personal injury, or property damage of $50 or more. Ch. 69-34, § 1, Laws of Florida. Moreover, in 1974 the legislature decriminalized most violations of Chapter 316, minimizing the impact upon a driver for non-reporting to a noncriminal infraction punishable by a fine

rather than a criminal offense. Ch. 74-377, Laws of Florida; §§ 318.14, 318.18, Fla. Stat. (Supp. 1974).

The 1991 amendments to the accident report privilege do not merely indicate that a defendant may affirmatively waive the privilege after being read Miranda warnings, as concluded by the court below. State v. Marshall, 21 Fla. L. Weekly D1865, 1866 (Fla. 3d DCA June 14, 1996). Rather, they confirm that a driver involved in an accident has no statutory duty to give a statement or any information to an officer which may be self-incriminating. If an officer may question a driver following a traffic stop or during any other temporary investigative detention without first reading Miranda warnings,[3] an officer's questioning of a driver at an accident scene should not necessarily be considered custodial interrogation. A contrary reading of the 1991 amendments to §§ 316.062 and 316.066, Fla. Stat. would be detrimental to public policy. Defendant drivers, who are probably unaware of the privilege or any duty to accurately report accidents, should not be given a windfall not intended by the legislature, which would far outweigh the remaining public benefit from the privilege of obtaining statistical data relating to the causation of accidents.

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[3] Berkemer, 468 U.S. 420, 441 (1984); § 901.151, Fla. Stat. (1995).

Because Respondent failed to demonstrate that he was in custody when he made the statements which he claimed were privileged, Miranda warnings were not required. Accordingly, Respondent's statements to police were not protected by the accident report privilege and the trial court did not err in overruling his objection to Trooper Cortes' testimony and allowing the statements in evidence. As such, the Circuit Court violated clearly established principles of law by vacating Respondent's conviction on this ground, and the District Court erred by failing to issue a writ of certiorari. Therefore, this Court should order the lower courts to vacate their decisions to the contrary, so that the judgment and sentence of the trial court can be reinstated.

CONCLUSION

WHEREFORE, based on the foregoing authorities and arguments, Petitioner respectfully submits that the decision of the District Court should be quashed with directions to enable the reinstatement of the judgment and sentence of the trial court.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

FLEUR J. LOBREE
Florida Bar No. 0947090
Assistant Attorney General
Office of the Attorney General
Department of Legal Affairs
444 Brickell Avenue, Suite 950
Miami, Florida 33131
(305) 377-5441
fax 377-5655

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing INITIAL BRIEF OF PETITIONER ON THE MERITS was mailed to LAURIE D. HALL, ESQ., Attorney at Law, 89240 Overseas Highway #1, P.O. Box 1126, Tavernier, Florida 33070, on this 7th day of November, 1996

FLEUR J. LOBREE
Assistant Attorney General

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

APPENDIX TO
BRIEF OF PETITIONER ON THE MERITS

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

FLEUR J. LOBREE
Assistant Attorney General
Florida Bar No. 0947090
Office of the Attorney General
Department of Legal Affairs
444 Brickell Avenue, Suite 950
Miami, Florida 33131
(305) 377-5441
fax 377-5655

judgment entered in her action against Metropolitan Dade County for false arrest and false imprisonment. We find that the undisputed facts in the record fully support the trial court's conclusion that probable cause existed for Ms. Bolanos' initial arrest and detention by the police. Since probable cause is a complete bar to an action for false arrest and false imprisonment, *White v. Miami Home Milk Prods. Ass'n*, 197 So. 125 (Fla. 1940); *Metropolitan Dade County v. Norton*, 543 So. 2d 1301 (Fla. 3d DCA), *rev. denied*, 551 So. 2d 462 (Fla. 1989); *Rothstein v. Jackson's, Inc.*, 133 So. 2d 331 (Fla. 3d DCA 1961), summary judgment was properly entered in the County's favor.

Affirmed.

* * *

Criminal law—Statements of defendant—Accident report privilege—Circuit court acting in its appellate capacity correctly ruled that county court should have precluded officer who investigated motorcycle accident from testifying about defendant's statements where, although officer informed defendant that he was commencing criminal investigation, he did not give defendant *Miranda* warnings—Amendments to statute which sets forth accident report privilege did not result in elimination of requirement that *Miranda* warnings be given once criminal investigation begins regarding an accident—Statute which provides that the statutory duty to make an accident report shall not be construed as extending to information which would violate privilege against self-incrimination does not eliminate requirement that *Miranda* warnings be given once criminal investigation begins regarding an accident

STATE OF FLORIDA, Petitioner, v. BURT MARSHALL, Respondent. 3rd District. Case No. 96-1397. L.T. Case No. 95-30163. Opinion filed August 14, 1996. On Petition for Writ of Certiorari from the Circuit Court for Monroe County, Steven P. Shea, Judge. Counsel: Robert A. Butterworth, Attorney General, and Fleur J. Lobree, Assistant Attorney General, for petitioner. Laurie D. Hall, for respondent.

(Before COPE, GODERICH and FLETCHER, JJ.)

(COPE, J.) The state petitions for a writ of certiorari to review an order of the circuit court entered in its appellate capacity. The state urges that we adopt the interpretation of the accident report privilege set forth in *State v. Riley*, 617 So. 2d 340 (Fla. 1st DCA 1993). We decline to do so and deny certiorari.

Defendant-respondent Burt Marshall was involved in a motorcycle accident in March of 1995. A Florida Highway Patrol Trooper arrived at the scene of the accident and performed an accident investigation. The trooper then advised defendant that he was commencing a criminal investigation. The trooper did not, however, advise defendant of his *Miranda*[1] rights. In response to the trooper's questions, defendant admitted that he had been drinking.

Defendant was charged with driving under the influence in violation of section 316.193, Florida Statutes ("DUI"). At trial, the county court excluded from evidence all statements made by the defendant during the accident investigation, holding that such statements were inadmissible under the accident report privilege. *See* § 316.066(4), Fla. Stat. (Supp. 1994). Over defense objection, the court allowed the officer to testify about statements made by defendant during the criminal investigation, even though *Miranda* warnings had not been administered. Defendant was convicted.

On appeal, the circuit court reversed. The circuit court ruled that when the officer announced the beginning of the criminal investigation, the officer should at that time have administered *Miranda* warnings. The court ruled that the defendant's admission that he had been drinking should not have been allowed into evidence, and found that the error was not harmless.[2] The circuit court ruled that defendant was entitled to a new trial. The state has petitioned for a writ of certiorari.

The crux of the state's argument is that the legislature's 1991 amendments to chapter 316, Florida Statutes,[3] had the effect of eliminating any requirement for a citizen to make an accident report under section 316.066, Florida Statutes. Beginning with that premise, the state argues that at present a roadside accident investigation should be viewed as nothing more than an ordinary investigatory stop under section 901.151, Florida Statutes. Since *Miranda* warnings are not required in an investigatory stop where defendant has not been placed under custodial arrest and is not otherwise "in custody" for *Miranda* purposes, *see Berkemer v. McCarty*, 468 U.S. 420, 435-42, 104 S. Ct. 3138, 3147-51, 82 L. Ed. 2d 317, 331-36 (1984), the state urges that the defendant's admission about drinking should not have been suppressed. We do not agree with the state's analysis.

Subsections 316.066(1) and (2), Florida Statutes require the driver of a vehicle which has been involved in any manner in an accident to make an accident report if the accident resulted in bodily injury or death, or damage in an apparent amount of at least $500.[4] Because the driver is required to report, the statute excludes from evidence "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 . . ." *Id.* § 316.066(4). The purpose of the statutory privilege is "to avoid a fifth amendment violation." *Brackin v. Boles*, 452 So. 2d 540, 544 (Fla. 1984). "[T]he purpose of the statute is to clothe with statutory immunity only such statements and communications as the driver, owner, or occupant of a vehicle is compelled to make in order to comply with his or her statutory duty under section 316.066(1) and (2)." *Id.*

Once the accident investigation ends and the criminal investigation begins, the accident report privilege is not applicable. However, because subsections 316.066(1) and (2) create a statutory duty to make statements during the accident investigation, it is necessary for there to be clear advice to the reporting person at roadside that the criminal investigation has begun and that the reporting person now has a right to remain silent. *See State v. Norstrom*, 613 So. 2d 437, 440 (Fla. 1993); *State v. Shepard*, 658 So. 2d 611, 612 (Fla. 2d DCA 1995).[5]

The state acknowledges that the foregoing was the customary procedure prior to the 1991 amendments to chapter 316. The state argues, however, that the rules have changed as a result of two 1991 amendments to chapter 316.

First, in 1991 the legislature inserted an exception into the part of section 316.066 which creates the accident report privilege. Immediately after the portion of the statute which states that "no such report or statement shall be used as evidence in any trial, civil or criminal," *id.* § 316.066(4), the legislature added the following: "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." *Id.* § 316.066(4) (Supp. 1994).[6]

In our view, what the 1991 legislature had in mind is the kind of situation which occurred in *State v. Norstrom*. *Norstrom* involved an accident which occurred in 1988, and consequently was governed by the pre-1991 version of the statute. *See* 613 So. 2d at 438. In that case, Norstrom was handcuffed at the scene of the accident and taken to the police station. At that time the police were conducting the accident investigation. Before questioning Norstrom the police officers advised him of his *Miranda* rights. Norstrom then waived his rights and made statements. Prior to trial Norstrom argued that his statements should be excluded from evidence under the accident report privilege of subsection 316.066(4). The Florida Supreme Court rejected the claim of privilege and held that the statements were admissible. 613 So. 2d at 440. The court reasoned that the sole purpose of the accident report privilege is to protect the privilege against self-incrimination. Since Norstrom had waived his rights, the purpose of the accident report privilege had been satisfied and there was no basis for excluding Norstrom's statements.[7]

As we see it, the *Norstrom* type of situation is what the

legislature contemplated when it amended the statute in 1991. Additionally, there may be other circumstances where statements made during an accident investigation are not protected by the privilege against self-incrimination. For example, "[w]hen a driver makes a spontaneous statement immediately following an accident, the driver does not make the statement for the purpose of complying with the duty to furnish an accident report and the statement is not privileged." Charles W. Ehrhardt, Florida Evidence § 501.2, at 239 (1996 ed.) (footnote omitted).

In sum, the 1991 amendment to subsection 316.066(4) created a limited exception to the accident privilege for criminal cases. The 1991 amendment did not change the fact that subsections 316.066(1) and (2) still require drivers to make accident reports. Subsection 316.066(4) carries forward the accident report privilege which remains fully operative, unless the statement made by the reporting person during the accident investigation is made after a waiver of *Miranda* rights or is otherwise not protected by the privilege against self-incrimination. *Id.* § 316.066(4).

The state's second argument is based on another part of the 1991 legislative amendments to chapter 316. In addition to amending section 316.066, which covers accident reports, the 1991 legislature also amended section 316.062, which imposes a duty to give information and render aid after an accident. To that statute the legislature added the following additional language: "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 shall not be construed as extending to information which would violate the privilege of such person against self-incrimination." *Id.* § 316.062(3); ch. 91-255, § 13, Laws of Florida.[8]

The state argues that this amendment to section 316.062 should be interpreted as also applying to section 316.066. The state urges that upon reading subsection 316.062(3) into section 316.066, it follows that a driver is no longer required to make a report or say anything to the investigating officer. The state's position appears to be that while there may be a duty to report, there is not a duty to say anything when making the report.[9] We do not think that the state's analysis is a plausible interpretation of the 1991 statutory amendments.

The 1991 amendments to chapter 316 were enacted in chapter 91-255, Laws of Florida. That piece of legislation added provisions regarding self-incrimination to both section 316.062 and section 316.066, Florida Statutes—and used different language in each case. When the legislature amended section 316.062, regarding the duty to give information and render aid, the legislature added the limitation that there would be no duty to make a report or give information which would violate the privilege against self-incrimination. § 316.062(3), Fla. Stat. However, when the legislature amended section 316.066, it also addressed the subject of self-incrimination, but used different and far more restrained language. The legislature amended the very subsection which creates the accident report privilege—subsection 316.066(4)—and in so doing stated that the 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." Tellingly, the legislature chose not to amend subsections 316.066(1) and (2), both of which compel drivers to make accident reports. Furthermore, the 1991 exception to the accident report privilege set forth in subsection 316.066(4) only applies to criminal cases, not civil cases.

Plainly if the 1991 legislature wanted to eliminate, or limit, the duty to report set forth in subsections 316.066(1) and (2), the legislature knew very well how to revise or amend those sections. The legislature did not do so. Instead, it left intact the longstanding duty to report, and created a very limited exception relating to the privilege against self-incrimination. We conclude that the accident report privilege of section 316.066 remains intact, but has been modified by the 1991 exception contained in subsection 316.066(4). We conclude that subsection 316.062(3), relied on by the state, should be interpreted as applying solely to the duty to give information and render aid set forth in section 316.062. In so holding we certify direct conflict with *State v. Riley*, 617 So. 2d at 343. We align ourselves instead with the Second District's position in *State v. Shepard*, 658 So. 2d at 612.

For the reasons stated, we agree with the ruling of the circuit court. The petition for writ of certiorari is denied.

Certiorari denied; direct conflict certified.

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

[2]The state does not challenge the circuit court's holding that the error was not harmless.

[3]*See* ch. 91-255, §§ 13,14, Laws of Fla.

[4]The accident in the present case was of sufficient magnitude to require an accident report under the statute.

[5]We reach this conclusion as a matter of Florida law. Of course, if at the end of the accident investigation the investigating officer places the defendant under custodial arrest, then *Miranda* warnings would be required in any event.

[6]As amended, subsection 316.066(4) provides in full:

> (4) 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. 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. The results of breath, urine, and blood tests administered as provided in s. 316.1932 or s. 316.1933 are not confidential and shall be admissible into evidence in accordance with the provisions of s. 316.1934(2). Accident reports made by persons involved in accidents shall not be used for commercial solicitation purposes; provided, however, that use of an accident report for purposes of publication in a newspaper or other news periodical or a radio or television broadcast shall not be construed as "commercial purpose."

[7]In so holding, the court pointed out that not only had Norstrom been given his *Miranda* rights, but also "Norstrom was not told that he had to respond to the questions asked by the officers . . . ." 613 So. 2d at 440. The court also stated:

> 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.

Id. at 440-41. As we interpret it, the court is addressing the situation which would exist if, during the accident investigation phase, the investigating officer administered *Miranda* warnings but then at some point also told the reporting person that he or she was required to respond to questions concerning the investigation of the accident. Telling the reporting person that he or she must answer questions during the accident investigation would undo any earlier-administered *Miranda* warnings. It would be then necessary at the conclusion of the accident investigation to advise the reporting person that the criminal investigation was beginning and to administer new *Miranda* warnings.

[8]As amended, section 316.062, Florida Statutes (1993) provides:

> 316.062 Duty to give information and render aid.—
>
> (1) The driver of any vehicle involved in an accident resulting in injury to or death of any person or damage to any vehicle or other property which is driven or attended by any person shall give his or her name, address, and the registration number of the vehicle he or she is driving, and shall upon request and if available exhibit his or her license or permit to drive, to any person injured in such accident or to the driver or occupant of or person attending any vehicle or other property damaged in the accident and shall give such information and, upon request, exhibit such license or permit to any police officer at the scene of the accident or who is investigating the accident and shall render to any person injured in the accident reasonable assistance, including the carrying, or the making of arrangements for the carrying, or such person to a physician, surgeon, or hospital for medical or surgical treatment if it is apparent that treatment is necessary, or if such carrying is requested by the injured person.
>
> (2) In the event none of the persons specified are in condition to receive the information to which they otherwise would be entitled under subsection (1), and no police officer is present, the driver of any vehicle involved in such accident, after fulfilling all other requirements of s. 316.027 and subsection (1), insofar as possible on his part or her part to be performed, shall forthwith report the accident to the nearest office of a duly authorized police authority and submit thereto the information specified in subsection (1).
>
> (3) 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 shall not be construed as extending to information which would violate the privilege of such person against self-incrimination.

[9]The state reasons that the reporting person is entitled to the full benefit of the privilege against self-incrimination and need not make any statements. Under that approach, the roadside accident investigation would then proceed like any other investigatory stop pursuant to section 901.151, Florida Statutes. In the ordinary roadside traffic investigation, as here, the reporting person is not "in custody" for *Miranda* purposes, and therefore need not be given *Miranda* warnings. *See Berkermer v. McCarty*, 468 U.S. at 435-42. In the state's view there would thus no longer be any distinction at all between the accident investigation phase and the criminal investigation phase of the case. Since in the state's view the reporting person is entitled to the right against self-incrimination and is not forced to make any statements at all during the accident investigation phase, it would follow that there would be no need to advise the reporting person when the investigation changes from traffic investigation to criminal investigation, nor would there be any need to administer *Miranda* warnings. Since the only deficiency in the present case was the failure to administer *Miranda* warnings after the investigation changed from traffic to criminal, and since defendant was not in custody for *Miranda* purposes, it would follow that the defendant's statements to the trooper during the criminal investigation were properly admitted into evidence at trial.

* * *

UNITED IMPEX, INC. vs. CITIBANK, N.A. 3rd District. #96-489. August 14, 1996. Appeal from the Circuit Court for Dade County. Affirmed. *McElveen v. Peeler*, 544 So. 2d 270 (Fla. 1st DCA 1989); *City of Cars, Inc. v. Simms*, 526 So. 2d 119 (Fla. 5th DCA 1988), *review denied*, 534 So. 2d 401 (Fla. 1988); *Stearns v. Landmark First Nat'l Bank*, 498 So. 2d 1001 (Fla. 4th DCA 1986); *Shelby Mut. Ins. Co. v. Crain Press, Inc.*, 481 So. 2d 501 (Fla. 2d DCA 1985), *review denied*, 491 So. 2d 278 (Fla. 1986); *Littman v. Commercial Bank & Trust Co.*, 425 So. 2d 636 (Fla. 3d DCA 1983); *Adams v. Brickell Townhouse, Inc.*, 388 So. 2d 1279 (Fla. 3d DCA 1980).

JONES vs. STATE. 3rd District. #95-3131. August 14, 1996. Appeal from the Circuit Court for Dade County. Affirmed. *Lynch v. State*, 293 So. 2d 44 (Fla. 1974).

MILLS vs. STATE. 3rd District. #95-3252. August 14, 1996. Appeal from the Circuit Court for Dade County. Affirmed. *See* § 924.06(3), Fla. Stat. (1995); *McGinty v. State*, 463 So. 2d 495 (Fla. 2d DCA 1985).

LA vs. STATE. 3rd District. #96-1851. August 14, 1996. Appeal under Fla.R.App.P. 9.140(g) from the Circuit Court for Dade County. Affirmed. *Lareau v. State*, 573 So. 2d 813 (Fla. 1991).

GARCIA vs. STATE. 3rd District. #96-2092. August 14, 1996. Appeal under Fla.R.App.P. 9.140(g) from the Circuit Court for Dade County. Affirmed. *Smith v. State*, 502 So. 2d 77 (Fla. 3d DCA 1987); *Green v. State*, 450 So. 2d 509 (Fla. 3d DCA 1984), *app'd*, 463 So. 2d 1139 (Fla. 1985); *State v. Jones*, 425 So. 2d 178 (Fla. 1st DCA 1983); *Tuff v. State*, 338 So. 2d 1335 (Fla. 2d DCA 1976).

* * *

Insurance—Automobile liability—Injuries sustained by driver as result of accident with pick-up truck that was owned by insured but was being operated by repairman—Policy exclusion of any person or occurrence arising from operation of repair shop or service station precluded coverage in this case even though repairman operated at a site on the side of the road without any permanent structure—Exclusion was applicable even though repairman worked as such only part-time

GORDON E. PAIGE, JR. and ELIZABETH PAIGE, Appellant, v. NATIONWIDE MUTUAL INSURANCE COMPANY, Appellee. 5th District. Case No. 94-2444. Opinion filed August 16, 1996. Appeal from the Circuit Court for Volusia County, Patrick G. Kennedy, Judge. Counsel: Darrell F. Carpenter of Gattis, Hallowes and Carpenter, P.A., Orlando, for Appellants. F. Bradley Hassell of Eubank, Hassell & Lewis, Daytona Beach, for Appellee.

(PER CURIAM.) Gordon E. Paige, Jr. and his wife, Elizabeth Paige ("Paige"), appeal the declaratory judgment in favor of Nationwide Mutual Insurance Company ("Nationwide"). Nationwide alleged that there was no coverage for injuries sustained by Paige as the result of an accident with a pick-up truck owned by Frank Cox, Nationwide's insured, because the vehicle had been surrendered to a repairman, William Lawrence Gossom, for repair work. Gossom was operating the vehicle at the time of the accident. We affirm.

Gossom is a professional mechanic who was entrusted with the car to make repairs and to start the car, but who was not authorized to move it from the repair site. At the time of the accident, he was moving the car to a shaded area. Although in the past Gossom had operated a repair shop out of a garage, he was not working out of a garage, building, or permanent structure on the day of the accident. He worked at a site on the side of the road at least three days of the week. The sign he posted at the site stated "Mechanic on Duty 8:00 to 5:00." Paige argues that the fact that Gossom had no building or shop makes him a "shade tree mechanic" or "itinerant mechanic" and not one excluded from coverage. In its complaint for declaratory relief against Gossom and Paige, Nationwide alleged that the Cox vehicle was excluded from coverage under the insurance policy because it was being operated by a "repair shop" or "service station" at the time of the accident. The Nationwide insurance policy specifically excluded from coverage "any person for any occurrence" arising from the operation of a "repair shop" or "service station."[1]

The only issue in the case is whether Gossom was operating a "repair shop" at the time of the accident with Paige. If he was, there is no coverage because Florida law has long held such exclusions reasonable in light of the risks associated with repair persons operating an insured's vehicle. *See Dixie Auto. Ins. Corp. v. Mason*, 155 So. 2d 172 (Fla. 1st DCA 1963); *State Farm Fire & Cas. Co. v. City Ins. Co.*, 759 F. Supp. 808 (S.D. Fla. 1991). The parties agree that there is coverage if the exclusion does not apply. Paige contends that the ordinary meaning of repair shop means a building or a structure, and that, since Gossom was not operating from a building or a structure, the exclusion does not apply. Paige also contends that since neither the policy nor Florida case law defines the term "repair shop," the term must be given its ordinary meaning. Further, Paige argues that if the term is ambiguous it must be strictly construed against Nationwide in favor of coverage. *See Fireman's Fund Ins. Co. v. Boyd*, 45 So. 2d 499 (Fla. 1950). Nationwide argues that the term is not ambiguous and that a rational construction is that Gossom was operating a "repair shop" or "service station" even though he was not operating from a building.

We begin our analysis with *Castillo v. Bickley*, 363 So. 2d 792 (Fla. 1978). In *Castillo*, the supreme court held that when the owner of a motor vehicle surrenders it to a repairman or serviceman, and the owner does not exercise any control over the vehicle, and it becomes involved in an accident caused by the repairman or serviceman "during the servicing, service-related testing, or transport of the vehicle," the owner is not liable. *Id.* at 793. The basis of the court's ruling was "social policy and pragmatism." *Id.* The court wrote:

> An automobile owner is generally able to select the persons to whom a vehicle may be entrusted for general use, but he rarely has authority and control over the operation or use of the vehicle when it is turned over to a firm in the business of service and repair. Moreover, an owner often has no acceptable alternative to relinquishing control of his vehicle to a service center, after which he has no ability to ensure the public safety until the vehicle is returned to his dominion.

Id.

In *Michalek v. Shumate*, 524 So. 2d 426 (Fla. 1988), the supreme court extended the holding in *Castillo* to negligence caused by a cleaning service. The Supreme Court declined to distinguish between types of service. *Id.* at 427. The court stated

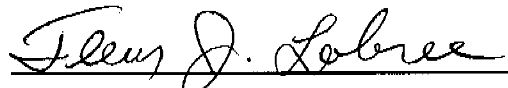
> The owner's dilemma is the same *regardless of the service offered*. He has no more control over his vehicle's use once delivered for cleaning than he has once delivered for transmission service.

Id. (emphasis supplied.) In this case, the vehicle was surrendered for service and its transport at the time the accident occurred was service-related. Based upon the activities of Gossom, the repairman, the Nationwide exclusion applies.

The determinative factor is not whether a building exists. Rather, we hold that the determinative factors are the type of work being done, the qualifications of the person doing the work, and the frequency with which the work is done. The reasoning in *Castillo* leads us to the conclusion that Gossom was operating a

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing APPENDIX TO BRIEF OF PETITIONER ON THE MERITS was mailed to LAURIE D. HALL, ESQ., Attorney at Law, 89240 Overseas Highway #1, P.O. Box 1126, Tavernier, Florida 33070, on this 7th day of November, 1996.



FLEUR J. LOBREE
Assistant Attorney General