IN THE SUPREME COURT OF FLORIDA

JAMES C. BABER,	:	
Petitioner,	:	
vs.	:	Case No. 96,010
STATE OF FLORIDA,	:	
Respondent.	:	
	:	

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
FOURTH DISTRICT

BRIEF OF AMICUS CURIAE FLORIDA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

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STATEMENT OF FONT SIZE

The size and style of type used in this brief is 12-point Courier New, a font that is not proprotionately spaced.

STATEMENT OF THE CASE AND FACTS

Amicus accepts the Statement of Case and Facts in the Initial Brief of the Petitioner, James C. Baber.

SUMMARY OF THE ARGUMENT

The traditional predicate for admission of scientific evidence must be established for the results of blood alcohol tests where the evidence is not in compliance with implied consent laws. This is especially so in criminal cases where the evidence may be crucial to proving the State's case, in order to protect the confrontation and due process rights of criminal defendants. The traditional predicate for such evidence must be established, even if the proponent of the evidence seeks its admission through the business record hearsay exception. The trial court erred in admitting blood alcohol test results as a business record and the district court erred in affirming the trial court.

ARGUMENT

ISSUE

THE TRADITIONAL PREDICATE FOR ADMISSION OF BLOOD ALCOHOL TEST RESULTS AGAINST A CRIMINAL DEFENDANT MUST BE ESTABLISHED WHERE THE IMPLIED CONSENT LAWS DO NOT APPLY, INCLUDING WHEN THE STATE SEEKS ADMISSION OF SUCH EVIDENCE AS A BUSINESS RECORD.

In cases where a party may seek admission of the results of blood alcohol tests and the implied consent laws do not apply, "either the state or the defendant may have the blood test evidence admitted on establishing the traditional predicates for admissibility, including test reliability, the technician's qualifications, and the test results' meaning." State v. Strong, 504 So. 2d 758, 760 (Fla. 1987); Robertson v. State, 604 So. 2d 783 (Fla. 1993) (blood-alcohol test results not meeting the requirements of the implied consent statute may be admissible upon establishing the three-prong predicate); State v. Sclafani, 704 So. 2d 128 (Fla. 4th DCA 1997) ("[T]he reliability criteria as stated in Strong governs. With medical blood, the state must demonstrate that the technician is qualified and that the test is reliable. Additionally, the state must demonstrate the tests meaning."); State v. Miles, 732 So. 2d 350 (Fla. 1st DCA 1999) (blood alcohol test results are admissible through the implied consent laws or by satisfying the three-prong predicate); State v. St. Pierre, 693 So. 2d 102 (Fla. 5th DCA 1997) ("Blood alcohol test results are admissible into evidence without regard to the requirements of the implied consent

statute provided that the State can `satisfy the traditional predicates for admissibility ...'"); Mitchie v. State, 632 So. 2d 1106 (Fla. 2d DCA 1994) (blood alcohol test results may be admitted without regard to the requirements of the implied consent law where the traditional predicate is established); State v. Walther, 519 So. 2d 731, 733 (Fla. 1st DCA 1988) ("[E]ither the state or the defendant may have the blood test evidence admitted on establishing the traditional predicates for admissibility ..."); State v. Lendway, 519 So. 2d 725 (Fla. 2d DCA 1988) ("[T]he results of the appellee's blood test may still be admitted if the state can establish the traditional predicates for admissibility of this evidence at trial.").

The legislature has established extensive predicates for the admission of evidence of alcohol tests which were administered by law enforcement or at the behest of law enforcement. "Prior to the adoption of sections 322.261 and 322.262, scientific tests of intoxication were admissible in evidence without any statutory authority if a traditional predicate established that (1) the test was reliable, (2) the test was performed by a qualified operator with the proper equipment and (3) expert testimony was presented concerning the meaning of the test." State v. Bender, 382 So. 2d 697, 699 (Fla. 1980).

> This predicate had to be established in each and every case. If the state failed to do so, the evidence was not admissible. Moreover, when the state attempted to establish the necessary predicate, the defense enjoyed an opportunity to rebut all of this evidence. If the defense introduced sufficient evidence to rebut any one of the ele-

> ments of the predicate, then once again the expert evidence was not admissible.

Robertson v. State, 604 So. 2d 783, 789 (Fla. 1993).

In Baber v. State, 24 Fla. L. Weekly D1478 (Fla. 4th DCA June 23, 1999), the Fourth District Court of Appeal held that the trial court properly admitted the blood alcohol report as a business record through the testimony of the hospital medical records custodian because this Court's decision in the civil case of Love v. Garcia, 634 So. 2d 158 (Fla. 1994) applies in criminal cases. The court held that such evidence was admissible without the necessity of establishing the traditional predicate for admissibility of Strong. Because of the possible impact of the decision on the manner in which DUI cases are tried throughout the Florida, the court certified the following question as one of great public importance:

> DOES LOVE V. GARCIA, 634 So.2d 158 (Fla.1994) APPLY IN CRIMINAL PROSECUTIONS WHERE BLOOD ALCOHOL TEST RESULTS ARE OFFERED AS PROOF TO ESTABLISH AN ELEMENT OF THE OFFENSE, IF THE BLOOD ALCOHOL TESTS WERE ADMINISTERED BY HOSPITAL PERSONNEL FOR MEDICAL TREATMENT PURPOSES?

Amicus believes that, to protect the confrontation and due process rights of criminal defendants, the traditional predicate must be established for admission of results of blood alcohol tests where the evidence is not in compliance with implied consent laws. This is especially so where the admission of the results of blood alcohol tests are the key evidence of an essential element of DUI offenses. Although the business record hearsay exception has been found to be firmly rooted, Bourjaily v. United States, 483 U.S.

171, 182-183, 107 S. Ct. 2775, 2782-2783, 97 L. Ed. 2d 144 (1987), Florida may require more of a predicate for admission of blood alcohol test results not covered by the implied consent law than merely having a record custodian testify that the records were kept in the normal course of business[1].

The Sixth and Fourteenth Amendments of the United States Constitution and Article 1 § 16 of the Florida Constitution provide for the right of an accused to confront adverse witnesses at his trial. The purpose of the right to confrontation is to ensure the reliability of the evidence against a defendant by subjecting it to rigorous testing in an adversary proceeding before the trier of fact. State v. Clark, 614 So. 2d 453 (Fla. 1992); Maryland v. Craig, 497 U.S. 836, 110 S.Ct. 3157, 111 L. Ed. 2d 666 (1990). The right to confrontation may not be satisfied where the only person who can be questioned may not have any first hand knowledge about the blood alcohol test performed. See Kettle v. State, 641 So. 2d 746 (Miss. 1994) (admission of a laboratory drug analysis test as a business record on the basis of the testimony of the record custodian denied the defendant his right to confront adverse witnesses where the defendant raised his right to question the technician who performed the test); Moon v. State, 300 Md. 354, 478 A.2d 695 (1984) (confrontation clause violated by admission of evidence under business record hearsay exception where discrepan-

[1] Although some states require that for a hospital's blood alcohol test results to be admissible as a business record the testing must be germane to treatment, in Love, 634 So. 2d at 160, this Court held that "[a]ctual reliance on the test in each course of treatment is not required."

cies on the face of the business record manifested indica of unreliability). See also State v. Henderson, 554 S.W.2d 117 (Tenn. 1977) (admission of the crucial evidence of the results of drug tests as a business record through the testimony of the director of the laboratory who certified the results but who had not supervised the tests and had no independent knowledge of the nature of the substances tested violated the defendant's right to confront the laboratory assistants who conducted the tests); Baker v. State, 449 N.E.2d 1085, 1087 (Ind. 1983) ("Although the specimens taken from L.C. and tested in the laboratory were not offered in evidence, the State cannot be permitted to present the conclusory fact that sperm was present in the specimens merely by presenting a hospital record stating a conclusion. It was incumbent upon the State to present evidence of the doctor or someone in authority present at the taking of the specimens from L.C., and to further demonstrate a chain of custody of the specimens to the laboratory where the testing was done and the conclusions drawn."), affirmed Baker v. State, 453 N.E.2d 190 (1983).

Under the Fifth and Fourteenth Amendments to the United States Constitution and Article 1 § 9 of the Florida Constitution, a person may not be deprived of life, liberty or property without due process of law. Due process protects a defendant against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the offense. Eliminating the need for a predicate for hospital records of blood alcohol tests lifts the burden from the State, as proponent of the evidence, to establish

test reliability, the technician's qualifications, and the test results' meaning, and shifts that burden to the defendant to establish a sufficient challenge to the reliability of key evidence in the State's case, to the detriment of the defendant's presumption of innocence. In some cases, the hearsay testimony might be the only evidence of an element of an offense, and a conviction based only on such hearsay may violate due process. Compare State v. Moore, 485 So. 2d 1279, 1281 (Fla. 1986) ("[T]he risk of convicting an innocent accused is simply too great when the conviction is based entirely on prior inconsistent statements."). See also Barnette v. State, 481 So. 2d 788 (Miss. 1985) (allowing the essential element of possession of a controlled substance to be proved solely by a certificate of the analysis of a controlled substance without the testimony of the analyst over a defense objection impermissibly lessens the state's burden of proof and denies the defendant's right to confront and cross-examine adverse witnesses).

The business record hearsay exception should not be used to provide a back door for admission and avoidance of the three-prong predicate or the requirements of the implied consent law. As this Court stated, upon affirming that the Frye[2] standard applies to the admission of scientific evidence in Florida, "it is the function of the court to not permit cases to be resolved on the basis of evidence for which a predicate of reliability has not been established. Reliability is fundamental to issues involved in the

[2] Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).

admissibility of evidence." Hadden v. State, 609 So. 2d 573, 578 (Fla. 1997).

This Court should rule that the traditional predicate of Strong continues to apply when the State seeks to admit blood alcohol test results, regardless of whether the State seeks to admit the report as a business record through the testimony of the hospital medical records custodian[3]. The requirement of establishing the predicate is especially necessary when the results of a blood alcohol test is key evidence against a criminal defendant.

[3] Even if the Fourth District Court is correct that blood alcohol reports of hospitals are admissible as a business record solely through the testimony of the hospital medical records custodian in cases where the implied consent laws do not apply, the court may have erred in holding that the trial court properly admitted the blood alcohol report in this case in light of the defense challenge to the reliability of the report.

Evidence should not be admitted as a business record if "the sources of information or other circumstances show lack of trustworthiness." § 90.803(6), Fla. Stat. (1991); Love, 634 So. 2d at 160. Also, "a trial judge may exclude the records if they are unfairly prejudicial or confusing." Love, 634 So. 2d at 160.

CONCLUSION

In light of the foregoing reasons, arguments, and authorities, the Appellant respectfully asks this Honorable Court to find that the traditional predicate of Strong must be established when the State seeks to admit blood alcohol test results, regardless of whether the State seeks to admit the report as a business record through the testimony of the hospital medical records custodian.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert Wheeler, Suite 300, 1655 Palm Beach Lakes Blvd., West Palm Beach, FL 33401, (561) 688-7759, and to Bruce Rogow and Beverly Pohl, Broward Financial Centre, 500 East Broward Blvd., Ste. 1930, Fort Lauderdale, FL 33394, (954) 767-8909, on this _____ day of September, 2000.

Respectfully submitted,

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