IN THE SUPREME COURT OF FLORIDA

DEAN A. TOWNSEND,

Petitioner ,

CASE NO. 1999-28
Lower Tribunal No. 99-275

vs.

STATE OF FLORIDA,

Respondent.

PETITIONER'S REPLY BRIEF

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CERTIFICATE OF FONT AND TYPE SIZE

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RECORD CITATIONS FORM

References to the record are made by reference to the Record on Appeal using the following abbreviations as appropriate: R. ___ ___.

ARGUMENT

The Second District Court of Appeal certified the following question as one of great public importance:

> Where the state lays the three-pronged predicate for admissibility of blood-alcohol test results in accordance with the analysis set forth in Robertson v. State, 604 So. 2d 783 (Fla. 1992), thereby establishing the scientific reliability of the blood-alcohol test results, is the state entitled to the legislatively created presumptions of impairment?

State v. Townsend, 24 Fla. L. Weekly D2587 (Fla. 2d DCA Nov. 17, 1999).

In its Answer Brief, Respondent fails to address the Petitioner's position that there is no presumption or inference of impairment outside of the implied consent law, Sections 316.1932 through 316.1934, Florida Statutes (1995). **The presumption of impairment is a legislatively created presumption that exists only within and as a result of the express terms of the implied consent statutes.**

The legislature created a statutory scheme which, if followed, gives rise to a presumption of impairment. Section 316.1934, Fla. Stat. (1995). According to the legislature, a chemical analysis of a person's blood to determine alcoholic content "in order to be considered valid under this section must have been performed substantially in accordance with methods approved by the Department of Law Enforcement...(emphasis added)." Section 316.1934(3), Fla. Stat. (1995). As stated by the Fifth District Court of Appeal:

> One intent of the purpose for specifying the method and means for such chemical tests is to ensure that only reliable scientific evidence is used in court proceedings to ***protect rights of defendants facing the repercussions of statutory presumptions in*** **their** criminal **trials.** (Emphasis added). State v. Reisner, 584 So.2d 141 (Fla. 5th **DCA** 1991), rev. denied: 591 So.2d 184 (Fla. 1991).

Accordingly, an invalid test, that is, a test not in compliance with the statutes, creates no presumption.

Additionally, in Robertson v. State, 604 So.2d 783 (Fla. 1992), this Court found that the blood test was only admissible without the statutory aid of the implied consent statutes, through a traditional predicate, but as a result, all presumptions created by the implied consent law, including the presumption of impairment, did not apply. Petitioner is merely requesting this Court to follow its holding in Robertson, supra.

Both the Second District Court of Appeal and the First District Court of Appeal in State v. Miles, 732 So. 2d 350 (Fla. 1st DCA 1999), following Robertson, hold that the blood-alcohol test results may only be admitted through a traditional predicate. Each, however, without explanation, would permit the jury to be instructed that the normal faculties of a driver with a blood-alcohol level of 0.08 or higher is presumed impaired.

The DUI statute defines driving under the influence by either driving a vehicle (a) under the influence of alcoholic beverages to the extent that the person's normal faculties are impaired; or (b)

while having an unlawful blood-alcohol level of 0.08 or higher. Section 316.193(1), Fla. Stat. (1995). This Court has stated that "the presumption of impairment created by this last statute [316.1934(2)] is a moot concern if the state proves beyond a reasonable doubt that the defendant operated a motor vehicle with an unlawful blood-alcohol level." Robertson, supra at 792 n 14. It is not "moot" if the State is attempting to prove impairment, Section 316.193(1)(a), Fla. Stat. (1995), as a result of an unlawful blood-alcohol level.

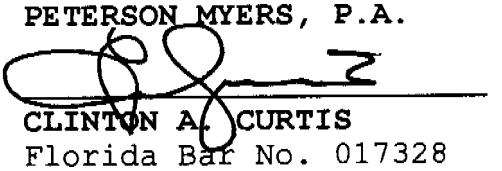
At trial an expert may render an opinion that the driver's blood-alcohol level exceeded 0.08. The jury may then be instructed that evidence of a blood-alcohol level of 0.08 or higher, if believed, constitutes a violation of the DUI statute. Section 316.193(1)(b), Fla. Stat. The expert may then testify that the normal faculties of a driver, with such a blood-alcohol level, is impaired. The jury may also be instructed that the evidence of impairment (including the blood-alcohol opinion), if believed, constitutes a violation of the DUI statute. Section 316.193(1) (a), Fla. Stat,

The allowance of the presumption of impairment instruction, in the absence of compliance with the implied consent statutes, gives an undeserved weight to the expert's opinion evidence regarding the relationship of the blood-alcohol level to impairment. The creation of a presumption or permissive inference, under these

circumstances, is not justified because there is no assurance that the scientific evidence is reliable as contemplated by the safeguards imposed by the implied consent statutes's core policies.[1] The Respondent should not be relieved of its burden of proving beyond a reasonable doubt an essential element necessary to constitute the crime.[2] Unless there is compliance with the implied consent statutes, Sections 316.1932 through 316.1934, Florida Statutes (1995), there is no authority for a presumption of impairment.

This Court should answer the certified question in the negative.

Respectfully submitted,
PETERSON MYERS, P.A.



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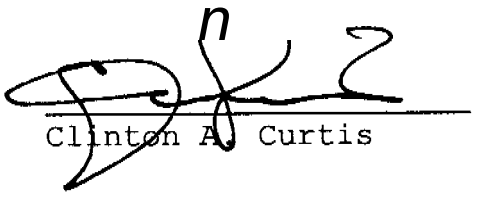
[1] The core policies of the implied consent statutes are twofold: to "'ensure reliable scientific evidence for use in future court proceedings' by establishing uniform, approved, procedures for testing" and "to protect the health of those persons being tested, who by this statute have given their implied consent to these tests." Robertson v. State, 604 So. 2d *783* (Fla. 1992), citing State v. Bender, 382 So. 2d 697 (1980).

[2] "Under federal and Florida law, due process guarantees protect a criminal defendant from conviction "except upon proof beyond a reasonable doubt *of* every *fact* necessary to constitute the crime with which he is charged. State v. Rolle, 560 So. 2d 1154, 1158 (Fla. 1990); citing In re Winship, 397 U.S. 358, 364 (1970). Accord Morgan v. State, 392 So. 2d 1315, 1316 (Fla. 1978).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief has been furnished by regular U.S. mail delivery to Susan D. Dunlevy, Assistant Attorney General, 2002 N. Lois Ave, Suite 700, Westwood Center, Tampa, FL 33607-2367, John Kirkland, State Attorney's Office, P.O. Box 9000, Drawer SA, Bartow, Florida 33831-9000, this February 11, 2000.



Clinton A. Curtis