IN THE SUPREME COURT STATE OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. **CASE NO. SC00-514**

ZINA JOHNSON

Respondent.
_____/

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

ANSWER BRIEF OF RESPONDENT

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STATEMENT REGARDING TYPE

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

TABLE OF AUTHORITIES

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PRELIMINARY STATEMENT

All references to the record on appeal shall be designated by the letter "R", followed by the page number. Petitioner shall be referred to as the "State" or the "Petitioner" and the Respondent shall be referred to as the "Respondent" or the "Defendant".

STATEMENT OF THE CASE AND FACTS

The Respondent adopts the Statement of the Case and Facts set out by the Petitioner in its initial brief.

SUMMARY OF THE ARGUMENT

The Second District Court of Appeals was correct when it affirmed the trial court's decision when it ruled that the Petitioner did not fulfill the statutory requirements of Florida Statute 395.3025(4)(d), when it subpoenaed the Respondent's medical records without first putting her on notice.

ARGUMENT

I.

THE SECOND DISTRICT COURT OF APPEAL DID NOT ERR WHEN IT AFFIRMED THE DECISION OF THE TRIAL COURT WHEN IT RULED THAT THE STATE DID NOT FULFILL THE STATUTORY REQUIREMENTS OF FLORIDA STATUTE 395.3025(4)(d), WHICH REQUIRES THAT THE DEFENDANT BE PROPERLY NOTICED BEFORE A SUBPOENA FOR MEDICAL RECORDS IS ISSUED.

The law is well settled that a trial court's ruling on a motion to suppress comes to the appellate court with a presumption of correctness, and that the reviewing court should interpret the evidence and reasonable inferences in a light most favorable to sustaining the trial court's ruling. Alston v. State, 723 So.2d 148 (Fla. 1998); San Martin v. State, 717 So.2d 462 (Fla. 1998); Herrmann v. State, 728 So.2d 266 (2nd DCA 1999); Brown v. State, 725 So.2d 1164 (2nd DCA 1998); Grant v. State, 718 So.2d 238 (2nd DCA 1998).

Applying these longstanding principles of law to the present case, there can be no dispute that the Respondent was never put on notice that the Petitioner intended to subpoena her medical records. Willie Brown, the investigator from the Petitioner Attorney's Office, testified during the hearing that he made no effort to serve the Respondent at the address provided to his office by the investigating officer on the case, Trooper Pascoe. Trooper Pascoe, a fellow law enforcement officer, listed her address as 712 61st Avenue Circle East in Bradenton. (R. 4). The record provides no explanation as to why Mr. Brown would fail to

begin his service attempts with the most obvious and readily available address known to him. Even a simple telephone call to the Department of Motor Vehicles would have corroborated this information.

The courts which have previously dealt with the notice requirement of 395.3025(4)(d) have all held that actual notice is required in order to comply with the statute. Ussery v. State, 654 So.2d 561 (4th DCA 1995). The failure to provide actual notice to the Respondent precludes the use of information obtained as a result of the subpoena. Clark v. State, 705 So.2d 1057 (4th DCA 1998); State v. Wenger, 560 So.2d 347 (5th DCA 1990).

The Petitioner in its initial brief states that the State made a "good faith effort" to provide notice, which alleviates its responsibility to provide proper notice under 395.3025(4)(d). A review of the applicable case law reveals that there has never been a Florida case which has declared a "good faith" exception to the notice requirement of 395.3025(4)(d).

Indeed, it is this type of behavior which the Fourth District specifically spoke of in State v. Rutherford, 707 So.2d 1129 (4th DCA 1998), when it said:

> "The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such

> conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care towards the rights of an accused." Id. at 1132.

While the record does not necessarily reflect that Mr. Brown acted with willful misconduct in failing to serve the Respondent with the medical records subpoena, there can be no doubt that his actions were indeed negligent. Mr. Brown never provides any explanation as to why he would not make an effort to read the probable cause affidavit to determine the Respondent's home address, nor does he explain as a professional investigator why he would not pick up the telephone and call Trooper Pascoe, or the Department of Motor Vehicles to determine the Respondent's current address. He provides no reasonable explanation why he did not contact the U.S. Postal Service to determine whether or not a change of address was filed. To say that Mr. Brown was negligent appears to be a severe understatement.

The case of Hunter v. State, 639 So.2d 72 (5th DCA 1994), replied upon by the Petitioner in its initial brief, is factually very different from the present case before this Court. The State in the Hunter case issued a first subpoena clearly in violation of the requirements of 395.3025(4)(d). Accordingly, the trial court quashed the subpoena. The second subpoena issued complied with all of the necessary statutory requirements. In ruling that the second subpoena was valid, the court emphasized

the fact that the State never obtained the medical records prior to the second subpoena.

Clearly, those are not the facts in this case. The Petitioner here already had the Respondent's medical records in its possession at the time of the October 9, 1998 Motion to Suppress hearing. Indeed, it had utilized these records in its investigation, since the probable cause affidavit mentioned that the Respondent had a blood alcohol reading of .118. (R. 3-4). Additionally, unlike in the Hunter case, the Petitioner here did not make any attempt to correct the original notice problem, even after the public defender's office was appointed to represent the Respondent. Judge Dubensky in his written order granting the motion stated the following:

> "It is unclear why the State did not set a hearing when it could not locate the Defendant. The Court would have inquired as to the State's attempts to notice the Defendant and if found to be reasonable, issued the subpoena. Under the circumstances presented in this case, the medical records and blood tests must be excluded." (R. 10).

In the case before this court, even when the Petitioner realized it had a problem with the notice requirement, it failed to issue a second subpoena, nor did it set a hearing before Judge Dubensky, which arguably could have cured the notice problem. Hunter does not stand for the proposition that the Petitioner can ignore the notice requirements completely, then later use those same records simply by complying with the statute.

The final case cited by the Petitioner in its initial brief is the recently decided case of State v. Manney, 723 So.2d 928 (5th DCA 1999). Manney involved a DUI manslaughter case where the investigating police officer originally obtained the results of a medical blood draw conducted by the hospital, without providing notice to the Respondent. Later on, a valid subpoena for the Respondent's medical records was issued, and notice was properly issued to the Respondent. The records obtained from the hospital were sealed pending a hearing before the trial court.

The court in Manney allowed the medical records to be used by the State as evidence, ruling that the State provided notice as required by 395.3025(4)(d).

Unlike the present case, the State in Manney issued a subpoena with proper notice to the Respondent. Manney does not stand for the proposition that a "good faith" exception to the notice requirement exists, nor does it

Lastly, the Petitioner states that the blood alcohol results should be allowed, since Florida Statute 316.1933 would have allowed the Trooper to forcibly draw blood, since the Respondent's passenger had died in the accident. This argument is especially without merit, since 316.1933 requires that a blood draw must be conducted by a properly licensed . In the present case, there is no evidence in the record whatsoever which would indicate that the requirements of 316.1933 had been met. Also,

the cases previously cited, namely Rutherford, Wenger, and Clark, all involved felony DUI charges; none of those cases stand for the proposition that the blood evidence should be admitted under an inevitable discovery doctrine. Respondent is also not aware of any case law which would allow the Petitioner to evade principles of Constitutional law.

CONCLUSION

Based upon the foregoing arguments, citations of authority, and references to the record, the opinion of the Second District Court of Appeals affirming the trial court's suppression was correct, and the decision of the Second District Court of Appeals should be affirmed.

CERTIFICATE OF SERVICE

I hereby certify that a complete and accurate copy of the foregoing has been furnished by U.S. Mail to the Office of the Attorney General, 2002 N. Lois Avenue, Westwood Center, 7th Floor, Tampa, Florida 33607, this _____ day of March, 2002.

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