IN THE SUPREME COURT 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

MERITS BRIEF OF PETITIONER

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STATEMENT REGARDING TYPE

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STATEMENT OF THE CASE AND FACTS

On February 9, 1998, Trooper Pascoe filed his affidavit as well as his uniform traffic citation charging Respondent with DUI manslaughter. On both the affidavit and the uniform traffic citation, the date of the crime is listed as October 4, 1997. (R. 3-5) The affidavit alleges that Respondent was traveling in excess of the posted speed limit and failed to negotiate the curve at State Road 45, striking the guard rail, at which point her right front passenger was ejected from the vehicle and suffered fatal injuries. Respondent's vehicle crashed into a ditch after crossing State Road 45. The affidavit goes on to say that sworn witnesses indicated that Respondent was the driver, and states "and her blood alcohol level was .118 grams of alcohol as per medical records obtained from Manatee Memorial Hospital." (R. 3) Also on February 9, 1998, the State filed its one count Information charging Respondent with DUI manslaughter alleging that it was committed on October 4, 1997 in accord with the affidavit and uniform traffic citation. (R. 1-3) A capias was issued. (R. 2) Both the uniform traffic citation and the arrest affidavit submitted on February 9, 1998 indicate Respondent's address as 912 61st Avenue Circle East. (R. 4-5) A year and a day after the crime was committed and eight months after the charges were filed, Respondent filed a motion to suppress the medical records and blood draw information relating to her admission at Manatee Memorial Hospital because of injuries she

sustained in the accident. (R. 6-7) The motion alleges that the medical records were obtained by law enforcement personnel and the information contained therein, specifically her blood alcohol level were being used against her by the State and were obtained without her consent in violation of the procedural requirements of Section 395.3025(4)(d), Fla. Stat. (R. 7)

On October 9, 1998, a hearing was held upon Respondent's motion to suppress. (R. 16-40) At that hearing, the prosecutor advised the court that the basic issue was notice to Respondent prior to obtaining the medical records. (R. 19) In that regard, the State presented the testimony of Willie Brown who testified he was an investigator for the State Attorney's Office whose job it is to locate witnesses. (R. 20) He said he is from Manatee County and has spent his entire life there and is very familiar with both Manatee and Sarasota Counties. He said he knew Respondent in passing although he did not know her personally. (R. 20-21) He also was aware that the victim was married to a friend of his. (R. 21) He indicated that another prosecutor (Mr. Lee) approached him and asked him to serve a Notice of Intent to Subpoena Medical Records to Respondent. At first, he went to the hospital but Respondent had already been discharged. He then went to his office and tried to find her on the computer at her last known address and found one on 59th Avenue in Bradenton. He went to that address but there was a new resident living in the house so he went

to the next door neighbor who told him he thought that Respondent had moved to St. Petersburg. (R. 22-23) He then called the decedent's husband in hope that he might be able to tell him if Respondent was in fact living in St. Petersburg. The descendant's husband advised Mr. Brown he would get back to Mr. Brown if he found out anything regarding Respondent's location. (R. 23) Mr. Brown then went to what he thought was Respondent's mother's house but no one was home that day. (R. 23) Outside of the location where he thought Respondent's mother lived were some gentlemen who he knew and he asked if they knew if Respondent was living with her mother and they told her she was not. They had no further information as to Respondent's whereabouts. He then went up to St. Petersburg and went to the St. Pete Police Department to see if they had any information on Respondent but they did not. (R. 23-24) After attempting to locate Respondent at the hospital, to what he believed was her last known address, to speaking to her neighbor, to calling the descendant's husband, to going to Respondent's mother's house, and going to St. Petersburg, he made no further effort to locate Respondent and gave the case back to Mr. Lee. (R. 25) On cross examination, he testified he did not pull Respondent's driver's license or go to the address listed on that driver's license. (912 61st Avenue Circle East). He did not go to the post office to get any information regarding a change of address. (R. 25)

Trooper Pascoe was available and counsel for Respondent indicated he was going to ask the trooper to testify that Respondent did not run or flee and was in the area and turned herself in. The prosecutor stipulated that Respondent turned herself in at some point in April when the trooper eventually got her, but said that was not relevant when they were looking for her to give her notice seven months previously in October. (R. 26-27)

Respondent testified that she lived at 912 61st Avenue Circle East in Bradenton (the address listed on her driver's license) for two years and she moved in March, 1998, and put in a change of address at the post office when she did. She also testified that her apartment is subsidized by HUD and that they also are aware of her change of address. (R. 27-28) On cross examination, she testified that at some point, she did live with her mother at 817 27th Street Court East. (R. 28-29) She testified she never moved to St. Petersburg. (R. 29)

The State acknowledged that the statute provides notice has to be given before an individual's medical records are subpoenaed, and urged that the State could have mailed a letter to Respondent to her last known address but went further by actually sending an investigator out there pounding the pavement looking for her at multiple locations. The prosecutor urged they did not make a bad faith attempt by merely dropping a letter into the mailbox at her last known address where they knew she no longer lived but made a

good faith effort to find her. (R. 30) The State asked the court what would be sufficient conduct for notice by the State .... whether it would be sending a letter to a residence where they knew Respondent no longer lived or a sincere good faith effort in continuing to try and find her. The State argued that in State v. Rutherford, infra, that the State Attorney's Office apparently continually sent out medical record subpoenas without giving any notice at all and the court got fed up with that conduct and put a stop to it by suppressing the evidence in order to force the State Attorney's Office to comply with the notice requirements. (R. 31) The prosecutor argued that was not applicable in the instant case because the type of conduct the Rutherford court sought to curb had not occurred in the instant case as the state tried to give notice; the prosecutor urged that his office has forms they send out in order to supply notice on a regular basis. (R. 31-32) The prosecutor said an individual cannot get out of the hospital and then run and hide because the State could never get the records for being unable to provide notice. The prosecutor urged that the statute is designed to give the person a chance to object but that the statute provides the State just has to get to the individual's last known address. The prosecutor further argued State v. Hunter, infra, urging that it stood for the proposition that the proper remedy is a belated hearing to prove the revelance of the medical records. (R. 32-33) The prosecutor then noted that Respondent

had notice of the medical records through discovery provided by the State for eight months and had no objection until trial was nearing. (R. 33-34) Counsel for Respondent urged that the case law required the court to suppress the medical evidence. (R. 34-37) Counsel for Respondent also argued the state should have taken the address off of Respondent's driver's license which was on the uniform traffic citation. (R. 35) In response, the State argued that Respondent never gave an address to anybody at the time of the accident and she never even saw Trooper Pascoe on the day of the accident and the first time Trooper Pascoe saw her was when he went to arrest her. (R. 37-38) The court noted that Respondent was not ticketed on the day of the accident, but was on February 9th which referred back to the accident of October 7, 1997. (R. 38-39) On October 9, 1998, the trial court entered its written order granting Respondent's motion to suppress. (R. 8-10) The court found that based upon case law authority and the lack of a good faith exception in Section 395.3025(4)(d), Fla. Stat. Respondent did not receive notice and therefore the motion to suppress was granted.

The State appealed and on February 11, 2000, the Second District Court of Appeal issued its per curiam opinion affirming the trial court's ruling on the basis of State v. Rutherford, 707 So.2d 1129 (4th DCA 1997) and certifying conflict with State v. Manney, 723 So.2d 928 (5th DCA 1999). On March 2, 2000, the State

filed its Motion to Stay Mandate and Notice to Invoke the Discretionary Jurisdiction of this Honorable Court. On March 13, 2000, this Court issued its Order Postponing Decision on Jurisdiction and Briefing Schedule.

SUMMARY OF THE ARGUMENT

Because there were efforts made to locate Respondent, and because the State requested a second opportunity to cause a subpoena to be issued to Respondent with notice, the trial court erred in suppressing the medical records sought by the State.

Additionally, since the facts warranted the taking of blood by force, but Respondent had left the hospital before the officer arrived there, the use of her blood alcohol report would be proper.

ARGUMENT

ISSUE I

> IN AFFIRMING THE TRIAL COURT'S ORDER SUPPRESSING THE MEDICAL REPORTS AND DENYING THE STATE AN OPPORTUNITY TO SERVE NOTICE OF RESPONDENT FOR HER MEDICAL RECORDS IN ORDER TO GIVE HER AN OPPORTUNITY TO OBJECT AND/OR FOR THE STATE TO ESTABLISH THE RELEVANCY OF THOSE RECORDS AFTER THE STATE'S INITIAL GOOD FAITH EFFORTS TO LOCATE RESPONDENT FAILED, THE OPINION OF THE SECOND DISTRICT COURT OF APPEAL, AS CERTIFIED BY THAT COURT CONFLICTS WITH THE OPINION IN STATE V. MANNY, 723 SO.2d 928 (5th DCA 1999).

Section 395.3025 Fla. Stat. (1997) provides that patient records from a treating facility shall be provided ....

> (d) "in any civil or criminal action, unless otherwise prohibited by law, upon the issuance of a subpoena from a court of competent jurisdiction and proper notice by the party seeking such records to the patient or his or her legal representatives."

It is clear in the instant case that the State endeavored to locate Respondent so that notice of the issuing subpoena could be served upon her in accord with the statutory provision above. Despite the State's errors in its attempts at locating her, it is clear from the record presented that a good faith effort was made.

In Rutherford v. State, 7075 So.2d 1129 (4th DCA) reh. cert. denied (en banc) (1998), the defendant was believed to be the driver of an automobile involved in a high speed crash; the passenger died at the scene. The police went to the hospital in

order to interview the defendant after noticing the odor of alcohol on his breath, and requested a blood sample pursuant to Section 316.1932(1)(c) or Section 316.1933, Fla. Stat. (1995). This "legal" blood was drawn 4 hours and 45 minutes after the crash, but since Rutherford had arrived at the hospital but 45 minutes after the crash, the police believed there were hospital reports made shortly thereafter indicating his blood alcohol level. The prosecutor caused a subpoena to issue for all of Rutherford's medical records without notice to either him or his attorney. The trial court granted the defendant's motion to suppress his medical records based on his constitutional right to privacy and the violation of the proper procedure by which to obtain such records pursuant to Section 395.3025(4)(d). In relying on Hunter v. State, 639 So.2d 72 (5th DCA) rev. den. 649 So.2d 233 (Fla. 1994) the Rutherford court held that the least intrusive means must be employed to invade a privacy right and the State must therefore demonstrate compliance with procedural safeguards which necessitate judicial approval prior to the State's intrusion into a person's privacy and denied the State's request for an opportunity to comply with the statute pursuant to Hunter v. State, supra by demonstrating the relevance of its records to its pending criminal investigation so that a second subpoena could issue for the same medical records. The dissent by Judge Polen pointed out that the majority failed to recognize that the court in Hunter allowed the

State to issue a second subpoena that comported with the dictates of the statutory provision in question and that in such a situation, the State could obtain blood pursuant to Section 316.1932 or Section 316.1933, but if it could not, the prosecution itself might be foreclosed. An additional dissent by Judge Farmer opined that no statutory violation occurred at all because operation of a motor vehicle itself is consent for the State to obtain blood alcohol test results after an accident of this nature, (fatality). The Rutherford majority stressed that exclusion of the evidence would serve the purpose of reaching a type of governmental action that an exclusionary rule was designed to deter ... prosecutorial misconduct that is likely to be prevented if the evidence was suppressed. Id. at 1132. In the instant case, there was no such prosecutorial misconduct as clearly within the two weeks following the accident efforts were made by the assigned prosecutor and the investigator to locate Respondent so that notice could be given. In fact, Respondent was not located or arrested for the instant crime for four months.

In Hunter v. State, supra, the State obtained the defendant's medical records pursuant to Section 27.04, Fla. Stat. (1993) by causing an investigative subpoena to be served upon the hospital where Hunter was taken after he was involved in a car accident where the other driver was killed. The court quashed the subpoena after Hunter showed the subpoena issued without notice to him

pursuant to Section 395.3025(4)(d). After submitting a second praecipe for a subpoena to properly issue the defendant again moved to quash. The trial court proceedings were stayed pending resolution of Hunter's Petition for Writ of Certiorari. The Fifth District Court of Appeal said the accident report and the death of the other driver made the blood alcohol reports obviously relevant, but that other portions of the medical records might not be which necessitated notice to the defendant and a hearing on relevancy issues if the defendant objected to issuance of the subpoena. The court then denied the Petition for Writ of Certiorari, and remanded for compliance with Section 395.3025(4)(d), Fla. Stat. rather than suppression or exclusion of what the State might be able to establish as relevant portions of the medical records.

In State v. Manney, 24 F.L.W. D222(a) (5th DCA January 15, 1999), the Fifth District Court of Appeal had the opportunity to revisit this issue once again. In Manney, the defendant was charged with four counts of DUI manslaughter and four counts of vehicular homicide. He filed a motion to suppress hospital records obtained by the trooper without subpoena and notice, which the trial court granted. The trooper had arrived on the scene after the defendant had been transported to the hospital. At the scene, the trooper determined that Manney was at fault, and then went to the hospital where he saw Manney in the emergency room. The trooper asked a nurse if legal blood had been drawn, to which

she responded it had not, but that a medical toxicological screening had been done. The trooper asked for a copy of the toxicological report and received it after receiving a hospital release that stated the information was being supplied pursuant to Section 316.1933, Fla. Stat. That section of course is not for a toxicological report, but rather for what is known as "legal" blood. The trooper was not however, given any other portion of the defendant's medical records. The report indicated that cocaine and cannabinoids were present in the defendant's blood, but there was no alcohol detected. At the suppression hearing, the defendant said that all of his medical records had later been obtained pursuant to subpoena with notice to him. The trial court suppressed his medical records finding the trooper obtained them in violation of the defendant's statutory doctor/patient privilege and the district court reversed. The district court found as it had in Hunter, supra, and as Judge Polen's dissent in Rutherford, supra, recognized, that failure to follow the proper statutory requirements for compelling disclosure of the medical records is not necessarily fatal to issuance of the records where they are later sought through proper means, i.e. subpoena with notice to the defendant. The court noted that if the defendant objected to their use, at the hearing the State must establish the relevancy through facts other than the content of the record themselves.

The same should have been allowed in the instant case.

Particularly since numerous efforts were made to locate Respondent in order to give her the appropriate notice and the State supplied the obtained medical records to her in discovery, suppression would not serve any meaningful purpose. As the State urged both hereinbelow and in Manney, supra, ... the deterrent purpose of the exclusionary rule is lost in a case in which the police did not engage in willful or negligent conduct, and upon the facts of this case will not serve the deterrent purpose of preventing future prosecutorial misconduct. Certainly there was no such intended prosecutorial misconduct in the instant case.

Alternatively, any error committed by the State in obtaining these records without notice is harmless since the blood alcohol level alone (without any other medical history or records) would have been obtainable pursuant to Section 316.1933 had the Respondent not been discharged from the hospital by the time the trooper got there. Certainly the death of the Respondent's passenger qualifies the circumstances to come within the purview of that provision which allows the taking of blood without consent (or without notice even if the defendant is unconscious) in cases of this nature, as noted by Judge Farmer's dissent in Rutherford, supra.

CONCLUSION

WHEREFORE based on the foregoing arguments, citations of authority and references to the record, the opinion of the Second District court of Appeal affirming the trial court's suppression of the blood alcohol and/or medical records in the instant case should be reversed and this cause remanded for the State to have an opportunity to serve notice upon Respondent and cause a second subpoena to be issued, and to establish relevancy of the records requested should Respondent object thereto.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Jeffrey A. Haynes, Esquire, 240 N. Washington Blvd., Suite 470, Sarasota, Florida 34236 this _____ day of March, 2000.

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COUNSEL FOR PETITIONER