IN THE SUPREME COURT OF FLORIDA

MARTIN MATTHEW DOBRIN,

Petitioner,

v. Case No. SC02-2540

FLORIDA DEPARTMENT OF
HIGHWAY SAFETY AND
MOTOR VEHICLES,

Respondent.

_____/

ON DISCRETIONARY REVIEW FROM THE
FIFTH DISTRICT COURT OF APPEAL

PETITIONER'S AMENDED REPLY BRIEF ON THE MERITS

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SUMMARY OF ARGUMENT

The Fifth District Court of Appeal applied the wrong law and exceeded the lawful scope of certiorari review. The mere fact that the district court considered the circuit court's opinion legally erroneous was insufficient to warrant an exercise of its certiorari power. Such action is permissible only in the face of a miscarriage of justice.

The Department's effort to salvage the district court's opinion under the tipsy coachman rule is misplaced. The tipsy coachman rule is designed to promote judicial efficiency in direct appeals. It has no place in a discretionary proceeding to review an erroneous precedential opinion which conflicts with an opinion of this Court. Moreover, the rule is not available in cases where, as here, there is insufficient record evidence to support the alternative theory of the case.

The Department cites Department of Highway Safety v. DeShong, 603 So. 2d 1349 (Fla. 2d DCA 1992) for the proposition that the police may stop a motorist to determine if the motorist is impaired under circumstances less suspicious than is required for other crimes. The suggestion that Fourth Amendment protections apply with less force in drunk driving cases is without merit and should be rejected.

ARGUMENT

THE DISTRICT COURT OF APPEAL EMPLOYED THE WRONG LEGAL STANDARD IN QUASHING THE TRIAL COURT'S ORDER.

The Department has candidly conceded that the district court of appeal applied the wrong legal standard in quashing the circuit court's order. (AB 5,18). However, by urging this Court to uphold the district court's ruling under the tipsy coachman rule, the Department ignores the procedural posture of this case. Under the tipsy coachman rule, an appellate court may affirm an order under review even if the reasoning of the order is erroneous, where the record supports an alternative basis for affirmance. See Robertson v. State, 829 So. 2d 901, 906-907 (Fla. 2002); Dade County School Board v. Radio Station WQBA, 731 So. 2d 638 (Fla. 1999). This is a prudential rule designed to promote judicial efficiency in direct appeals. Cf. Robertson, 829 So. 2d at 906-907 (describing rule as a "doctrine of appellate efficiency").

The rule has no real application in cases of discretionary review, especially cases involving conflicting published opinions. This Court's role, as the state's policy court, is to establish the correct law and quash the erroneous ruling by the lower court. The mischief created by a published, precedential opinion espousing an erroneous rule of law cannot be cured or swept under the rug by invoking the tipsy coachman's rule. Moreover, the tipsy coachman rule can only be invoked

where there is record support for the alternative theory. See Robertson, 829 So. 2d at 906-907. As discussed in Petitioner's initial brief on the merits and below, the record does not support a finding of either probable cause to stop Petitioner for a traffic infraction or reasonable suspicion to stop him for driving under the influence ("DUI").

The district court's error in applying the wrong legal standard was compounded by the fact that the court exceeded the appropriate scope of its "second appeal" certiorari review. A circuit court's order on a certiorari petition which is "made according to the form of law and the rules prescribed for rendering it, although it may be erroneous in its conclusion as to what the law is as applied to facts, is not an illegal or irregular act or proceeding remediable by certiorari." Haines City Community Development v. Heggs, 658 So. 2d 523, 525 (Fla. 1995). The district court must be primarily concerned with the seriousness of the error, not the mere existence of error, and should exercise its certiorari power only when there has been a violation of clearly established law resulting in a miscarriage of justice. Combs v. State, 436 So. 2d 93, 95-96 (Fla. 1983). "District courts have never been allowed to review decisions, under the guise of certiorari jurisdiction, simply because they are dissatisfied with the result of a decision of a circuit court sitting in its appellate capacity." Ivey v. Allstate Insurance Co., 774 So. 2d 679, 683 (Fla. 2000). An erroneous interpretation of the law which does not rise to the

level of a miscarriage of justice is insufficient to warrant certiorari review. See Ivey, 774 So. 2d at 683.

In this case, the circuit court's thorough opinion complied with the form of the law and the applicable rules. See Heggs, 658 So. 2d at 525. The basis for the district court's opinion was that the circuit court "applied the wrong law." Department of Highway Safety v. Dobrin, 829 So. 2d 922 (Fla. 5th DCA 2002). The controversial portion of the challenged order was the circuit court's statement that it could not consider a basis for the stop which the officer himself did not consider. (R.19-20). Even assuming this was an erroneous statement of law, it was insufficient to warrant an exercise of the district court's certiorari power because there was no miscarriage of justice. See Ivey, 774 So. 2d at 682-683. For the reasons discussed in the initial brief and below, there is insufficient record evidence to support a stop for either exceeding the speed limit or driving under the influence.

Moreover, Petitioner questions whether the circuit actually misstated the law. It appears from the context of the opinion that the circuit court was merely saying that there was no competent, substantial evidence to support a stop for either speeding or DUI. (R.17-20). Absent any evidence of the speed limit or that the officer cited Petitioner for speeding, there is no record basis to find that Petitioner's speed was illegal. As for DUI, it is well settled that the facts

supporting a stop must be interpreted in light of the officer's knowledge, training, and practical experience. See Belsky v. State, 831 So. 2d 803, 804 (Fla. 4th DCA 2002); Jones v. State, 806 So. 2d 590, 592-593 n.7 (Fla. 5th DCA 2002). In this case, there is no record evidence establishing the arresting officer's background. The fact that the officer did not expressly state that he suspected Petitioner of drunk driving strongly suggests that Petitioner's driving pattern was not so erratic as to create such suspicion in light of the officer's training and experience.

The statutory scheme governing formal review hearings permits the Department to rely solely on the reports provided by the arresting agency. § 322.2615(11), Fla. Stat. (2002). While this is certainly convenient for the Department, inasmuch as it dispenses with the necessity of live witness testimony, it may also result in a poorly developed factual record. If the Department chooses to present no live testimony, but to instead rely exclusively on written documents, then it must be prepared to live with the limitations of that evidence. Cf. Hall v. Department of Highway Safety, 4 Fla. L. Weekly Supp. 208 (Fla. 18th Cir. July 9, 1996).

Remarkably, the Department seeks to excuse its failure of proof by arguing that Petitioner had the ability to prove that he was *not* exceeding the speed limit. (AB 9-10). The standard of proof in a formal review hearing is preponderance of the evidence. § 322.2615(7), Fla. Stat. (2002). While the licensee has the option

of presenting evidence in his or her defense, it is plainly the Department's burden to bring forward sufficient evidence to sustain the suspension. See Vernon v. State, 558 So. 2d 535 (Fla. 1st DCA 1990); Department of Highway Safety v. Farley, 633 So. 2d 69 (Fla. 5th DCA 1994). Because there is no record evidence whatsoever to establish the speed limit of the road on which Petitioner was driving, it cannot be said by a preponderance of the evidence that he was speeding.

The Department next argues that the arresting officer had reasonable suspicion to stop Petitioner for DUI, even in the absence of probable cause to stop for a traffic infraction. Any time the legality of a stop is raised, the Department reflexively cites Department of Highway Safety v. DeShong, 603 So. 2d 1349 (Fla. 2d DCA 1992) for the proposition that the police may stop a motorist to determine if the motorist is ill, tired, or impaired under circumstances less suspicious than is required for other crimes. (AB 8-9). To the extent DeShong stands for this proposition, it is wrongly decided. The relevant passage of DeShong is as follows:

> The courts of this state have recognized that a legitimate concern for the safety of the motoring public can warrant a brief investigatory stop to determine whether a driver is ill, tired, or driving under the influence in situations less suspicious than that required for other types of criminal behavior. In Bailey v. State, 319 So.2d 22 (Fla.1975), the Florida Supreme Court upheld the traffic stop of a driver who was observed driving her vehicle at a slow rate of speed and weaving within her lane of traffic. The court expressly stated that there were no circumstances which would reasonably have led the officer to believe criminal activity was taking place. 319 So.2d at 26. The court

> nevertheless validated the traffic stop, stating that "[b]ecause of the dangers inherent to our vehicular mode of life, there may be justification for the stopping of a vehicle by a patrolman to determine the reason for its unusual operation." Id.

DeShong, 603 So. 2d at 1352.

DeShong's analysis of Bailey is erroneous. The Bailey court did not "expressly state[] that there were no circumstances which would reasonably have led the officer to believe criminal activity was taking place." The court merely observed that "no vehicular regulation was being violated[.]" Bailey, 319 So. 2d at 26. What the court did "expressly state" was that the officer may have suspected that the driver, who was weaving and driving slowly, was under the influence. Id. The legality of the stop was, at best, a peripheral issue in Bailey. It is not even clear whether the defendant challenged the legality of the initial stop, which would render the passage on which the Department so heavily relies, (AB 13), mere dicta.

By premising its conclusions on a misreading of Bailey, DeShong attempted to extend the law of search and seizure to create an entirely new category of police-citizen encounters, one that is without any support in the law: An investigatory detention based on a bare suspicion or hunch that the citizen is ill, tired, or driving under the influence. Since DeShong, Florida case law has uniformly recognized only three levels of police-citizen encounters: 1) arrest, requiring probable cause; 2) investigatory detention (also known as a seizure), requiring reasonable

suspicion; and 3) consensual encounter, in which the citizen is free to leave at any time. See Popple v. State, 626 So. 2d 185 (Fla. 1993); State v. Robinson, 740 So. 2d 9 (Fla. 1st DCA 1999); Coney v. State, 820 So. 2d 1012 (Fla. 2d DCA 2002); Phillips v. State, 781 So. 2d 477 (Fla. 3d DCA 2001); Leahy v. State, 770 So. 2d 269 (Fla. 4th DCA 2000); McMaster v. State, 780 So. 2d 1026 (Fla. 5th DCA 2001). These cases do not recognize the type of encounter DeShong seemingly would sanction: An investigatory detention for DUI based on something less than reasonable suspicion.

It appears that DeShong may be the result of concerns over the dangerousness of vehicles in general, and drunk drivers in particular. See DeShong, 603 So. 2d at 1352 (citing Bailey, Michigan Dep't of State Police v. Sitz, 496 U.S. 444 (1990), and State v. Potter, 438 So. 2d 1085 (Fla. 2d DCA 1983)). While Petitioner acknowledges "the dangers inherent to our modern vehicular mode of life," Bailey, 319 So. 2d at 26, those dangers do not justify relaxing the standards of the Fourth Amendment. The case of Florida v. J.L., 529 U.S. 266 (2000), is instructive. There, the United States Supreme Court declined to adopt a "firearm exception" to the Fourth Amendment, which would have allowed police to search suspects on the basis of unverified anonymous tips that the suspect was carrying a firearm. While recognizing the serious danger such weapons pose, the Court was unwilling to compromise Fourth Amendment principles on the basis of

such danger. J.L. affirmed an opinion of this Court. This Court expressed concern that carving out exceptions to the reasonable suspicion requirement would place courts on the top of a slippery slope. J.L. v. State, 727 So. 2d 204, 208 n.3 (Fla. 1998); see also State v. Sprague, 824 A.2d 539, 550 (Vt. 2003)("The erosion of liberty is a slow, subtle process, and we are long gone down the road before a memory of what we used to have causes us to look back and notice our loss."). Similarly, this court should be unwilling to countenance a weakening of the reasonable suspicion requirement for investigatory detentions in DUI cases. See State v. Puckett, 2003 WL 21542465 (Tenn.Crim.App. July 9, 2003, at Knoxville)("Although driving under the influence indeed poses a grave danger to motorists, unfettered governmental intrusion upon constitutionally guaranteed liberties also poses a danger.").

Viewed against this backdrop, reading DeShong to authorize a DUI stop on something less than a reasonable suspicion based on articulable facts would violate Fourth Amendment principles. The better view is to interpret DeShong to merely authorize a vehicle stop based on a reasonable suspicion of drunk driving even in the absence of any traffic infraction. This is the interpretation accorded DeShong by Roberts v. State, 732 So. 2d 1127, 1128 (Fla. 4th DCA 1999). The interpretation urged by the Department would render DeShong "an isolated

deviation from the strong current of precedent--a derelict on the waters of the law." See Lambert v. California, 355 U.S. 225, 232 (1958)(Frankfurter, J., dissenting).[1]

The Department's contentions notwithstanding, the factual record does not support a finding of reasonable suspicion. The factors identified by the Department in support of its reasonable suspicion argument are high rate of speed, failure to maintain a single lane, and weaving. Absent any evidence that Petitioner was exceeding the posted speed limit, the conclusory statement that he drove at a "high rate of speed" is unpersuasive. Although Petitioner received a traffic citation for failing to maintain a single lane, there is no competent substantial evidence that Petitioner actually drove outside of his lane. (R.35). The narrative in the arrest affidavit reflects merely that Petitioner drifted to the right an unspecified number of times for an unspecified distance and unspecified duration. (R.36). This vague, unparticularized evidence is not sufficient to support a finding of reasonable suspicion. See State v. Arriaga, 5 S.W.3d 804 (Tex.App.-San Antonio 1999, pet. refused)(trial court properly granted motion to suppress where officer failed to testify with any specificity regarding the number of times he observed defendant drift within his lane). A reasonable suspicion requires particularized evidence that criminal activity was afoot. Park v. Shiflett, 250 F.3d 843, 851 (4th Cir. 2001).

[1] Petitioner has not addressed the "community caretaker" aspect of DeShong, regarding the permissibility of a vehicle stop to check on the welfare of the driver, because that issue is not implicated in this case.

As discussed in the initial brief, some drifting or weaving is normal even in sober drivers and does not furnish a basis for an investigatory detention. See Brown v. State, 62 So. 2d 348 (Fla. 1953); Graham v. State, 60 So. 2d 186 (Fla. 1952); Collins v. State, 65 So. 2d 61 (Fla. 1953).[2] Moreover, Officer Thomas did not observe the alleged drifting until after he executed a U-turn and began to follow Petitioner in an effort to pace him. (R.36). This type of police conduct, which Petitioner could hardly have failed to notice, is very likely to distract a motorist into departing from a straight line of travel. See United States v. Jimenez-Medina, 173 F.3d 752, 755 (9th Cir. 1999)(it is "quite natural" for a motorist to be preoccupied with a police vehicle following him or her); United States v. Ochoa, 4 F.Supp.2d 1007 (D. Kan. 1998)(patrol car likely was a significant factor in causing defendant's car to drift momentarily onto the shoulder).

By quoting Ellis v. State, 755 So. 2d 767, 768 n.1 (Fla. 4th DCA 2000), the Department suggests that the United States Supreme Court did not intend to mandate a probable cause standard for vehicle stops based on traffic infractions.

[2] Contrary to the Department's suggestion, Bailey did not *sub silentio* overrule Brown, Graham, and Collins. See Puryear v. State, 810 So. 2d 901, 905 (Fla. 2002)(Supreme Court does not intentionally overrule itself *sub silentio*). As discussed above, the expansive significance accorded Bailey by both the Department and DeShong is wholly unsupported by the Bailey opinion itself. Brown, Graham, and Collins remain good law. See also Kehoe v. State, 521 So. 2d 1094, 1097 (Fla. 1988)(it is difficult to drive without committing some trivial traffic infraction). If anything, these cases are more important than ever in light of the Department's dogged efforts to weaken Fourth Amendment protections for motorists in DUI cases.

(AB 15-16). That has been the practical effect of the high court's opinion in Whren v. United States, 517 U.S. 806 (1996), with Florida courts unanimously applying the probable cause standard to such stops since Whren was handed down. See e.g. Holland v. State, 696 So. 2d 757, 759 (Fla. 1997); Glock v. Moore, 776 So. 2d 243, 251-252 (Fla. 2001); Bender v. State, 737 So. 2d 1181 (Fla. 1st DCA), rev. denied, 744 So. 2d 452 (Fla. 1999); Jones v. State, 842 So. 2d 889, 891 (Fla. 2d DCA 2003); State v. Hernandez, 718 So. 2d 833, 836 (Fla. 3d DCA 1998); Donaldson v. State, 803 So. 2d 856, 858-859 (Fla. 4th DCA 2002); State v. Kindle, 782 So. 2d 971, 973 (Fla. 5th DCA 2001). Despite the Ellis court's misgivings, the United States Supreme Court surely knows the difference between probable cause and reasonable suspicion, having explained this distinction in prior cases. See e.g. Ornelas v. United States, 517 U.S. 690, 696 (1996); United States v. Sokolow, 490 U.S. 1, 7 (1989).

There are good reasons for requiring probable cause, as opposed to reasonable suspicion, for stops based on traffic infractions. For one thing, a non-criminal traffic infraction is less serious than a criminal offense. The reasonableness of police conduct under the Fourth Amendment involves a balancing of state interests against "the individual's right to personal security free from arbitrary interference by law officers." Maryland v. Wilson, 519 U.S. 408, 411-412 (1997). Because the state's interest in investigating, punishing, and

deterring traffic infractions is less weighty than the State's interest in fighting actual crime, the Fourth Amendment requires a higher level of justification for interfering with the citizen's personal liberty on the basis of a traffic infraction.

Moreover, the state's interest in conducting further investigation is rarely implicated in a stop for a traffic infraction. While an investigatory detention for a crime may lead to the discovery of additional evidence, the large majority of traffic infractions yield no evidence other than the officer's observation of the infraction as it occurs. In most cases the stop puts an end to the ongoing violation and no further evidence is discovered during the ensuing stop. The purpose of the stop may be to halt the violation or to write a ticket, but it is rarely to uncover additional evidence of the traffic violation. Because the purpose of these stops is rarely to further investigate the infraction, the policy supporting the reasonable suspicion standard for *investigatory* detentions is not applicable.

In summary, the district court of appeal applied the wrong legal standard and exceeded the scope of its certiorari review. The Department's efforts to save the district court's erroneous ruling under the tipsy coachman rule should be rejected. The district court's opinion should be quashed.

CONCLUSION

BASED ON THE foregoing argument and authority, Petitioner respectfully requests that this Honorable Court quash the decision of the Fifth District Court of Appeal and reinstate the order of the circuit court.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. Mail to Heather Rose Cramer, Esq., Assistant General Counsel, 6801 Lake Worth Road, Suite 230, Lake Worth, FL 33167, this 20th day of August, 2003.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the font used in this pleading is 14-point Times New Roman.

RESPECTFULLY SUBMITTED,

WHITED, FULLER, MILLER & FOXMAN

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