IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,
Petitioner,

vs.

S. Ct. CASE NO: SC03-622
2DCA CASE NO.: 2D01-3535

ANTHONY TROY BODDEN,
Respondent.
_____/

INITIAL BRIEF OF THE RESPONDENT ON THE MERITS

_____

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PRELIMINARY STATEMENT

The Petitioner incorrectly states in her brief that the State was the Appellee in the Second District and that the Respondent was the Appellant. The State was the Appellant and Mr. Bodden was the Appellee.

STATEMENT OF THE CASE AND FACTS

The Respondent accepts and adopts the statement of facts as stated by the appellant. The Respondent restates some of the facts surrounding the suppression of the urine results.

The Respondent submitted to a urine test after having been given implied consent warnings. (R. 6, 7, 31). He moved to exclude the urine tests for violation of the administrative procedures act (R. 11-16). The trial court granted the motion.(R. 25-27).

The State and Respondent agreed to the admissibility of a deposition of Mr. Dale Livingston, a chemical analyst with FDLE, and that the testimony of the analyst in this case would be the same as Mr. Livingston's from a different case. (R. 31). Mr. Livingston developed procedures for the testing for the presence of controlled substances in urine samples that is used by all the analysts through out the State of Florida. (R. 136-140, 162-163, 178-185). His procedures were never promulgated in accord with Florida

Statute 120.50 et seq. (R. 136-140, 178-185). In fact, there are no “approved urine tests” in the state of Florida in accord with Florida Statute 316.1932.

SUMMARY OF THE ARGUMENT

The trial court did not abuse it's discretion or fail to follow the law by excluding the urine test results. Additionally, the Second District did not err when it affirmed the county court's order excluding Bodden's urine test results.

Dale Livingston, a chemical analyst with FDLE , developed procedures to test for the presence of controlled substances in urine that are used by all analysts throughout Florida. His procedures qualify as a "rule" under Florida Statute 120.50 et seq. And therefore should have been promulgated pursuant to chapter 120.50. In addition, Florida Statute 316.1932 requires that all chemical tests be "approved" and FDLE has never approved a urine test. FDLE's failure to promulgate Dale Livingston's procedures for testing for the presence of controlled substances in urine violates the administrative procedures act.

Contrary to the Petitioner's assertion, Florida Statutes do require an approved test and do empower FDLE to promulgate rules regarding urine testing.

The trial court found a violation She also rejected the state's argument that it could still admit the urine test results under the traditional predicate

because the Defendant did not voluntarily consent to the urine test (having been given an implied consent warning, it made his consent coerced).

ARGUMENT

The State's claim that this court's standard of review is De Novo review is a gross misapplication of State v. Glatzmayer, 789 So.2d 297 (Fla. 2001). (See Glatzmayer at Footnote 7 – the court articulated the standard of review from trial court orders, not second tier appeals. The Second District's standard of review was subject to a De Novo review but not this court). The State has misapplied Glatzmayer because this is a second tier appeal, therefore, it is no longer subject to a De Novo review, rather the standard of review is whether the court departed from the essential requirements of law to the extent that the error is a violation of a clearly established principle of law resulting in a miscarriage of justice. Ivey v. AllState Ins. Co., 774 So.2d 679 (Fla. 2000), Combs v. State, 436 So.2d 93 (Fla. 1983), State of Florida, Department of Highway Safety and Motor Vehicles v. Alliston, 813 So.2d 141 (2nd DCA 2002).

ISSUE 1 – Florida Statute 316.1932 requires that the defendant submit to an approved urine test.

The trial court in this case found that Florida Statute 316.1932 requires that the Florida Department of Law Enforcement adopt an "approved urine test" in accord with the administrative procedures act, Florida Statute Chapter 120.50 et al. The trial court went on to find that no such procedure has ever been promulgated in accord with the act and that the

procedures currently used to test urine samples (because they have never been properly promulgated) violate the administrative procedures act. (R. 25-27). The Second District agreed, finding that when reading Florida Statutes in harmony, it required that an “approved” urine test be offered, rather than simply “any test”.

A - What does it mean to be "approved"?

Florida Statute 316.1932 requires that every person who accepts the privilege to drive in Florida must submit to an "approved" test. Florida Statute 316.1932 (1991). Florida Statute 316.1932 does not require persons to submit to "any test", rather the specific language of the statute uses the term "approved". Florida Statute 316.1932 (1991). The term "approved" has special meaning. An “approved test” as contemplated by the implied consent law (316.1932 F.S.) is a test that has been set up (or established) in accord with the applicable administrative provisions; drivers are not required under Florida Statute 316.1932 to submit to "any test", rather only an "approved test". State v. Polak, 598 So.2d 150 (1st DCA 1992), State v. Flood, 523 So.2d 1180 (5th DCA 1988).

In both Flood and Polak, the breath machines were modified and never retested, therefore, the courts ruled that the machines were not

"approved" and suppressed the breath test results. Polak, Supra, Flood, Supra.

While Flood and Polak are breath testing cases, it is a distinction without substance. It is immaterial that the subject of this appeal is a urine test and not a breath test, the implied consent law requires that a breath, blood, or urine test be “approved”. 316.1932 Florida Statutes (1991).

Florida Statute 316.1932 states:

> Any person who accepts the privilege extended by the laws of this state of operating a motor vehicle within this State is, by so operating such vehicle, deemed to have given his or her consent to submit to an **approved chemical test** or physical test including, but not limited to, an infared light test of his or her breath for the purpose of determining the alcoholic content of his or her blood or breath, and to a urine test for the purpose of detecting the presence of chemical substances.... Florida Statute 316.1932 (1991). (emphasis added).

The gramatical construction of Florida Statute 316.1932 requires that the urine test be approved. While a comma appears just prior to the term “urine test”, the term approved (which is mentioned earlier in the statute) is also referring to a “urine test” in addition to breath and blood. The statute clearly requires that every test, whether breath, blood, or urine, be “approved”. 316.1932 Florida Statute (1991). The State’s position that the coma indicates that the sentence should be read as two is incorrect. Rather, the use of the

coma instead of a semi-colon supports Mr. Bodden's argument that the term approved relates to all three possible tests, not just the two suggested by the State.

Alternatively, under the Equal Protection Clause of both the Federal and State Constitutions, a defendant charged with violating Florida's DUI Statute by impairment of controlled substances with a urine test as evidence is entitled to the same protection as a defendant charged with violating the same statute where the evidence is based on a breath test or blood test. If defendant's charged with DUI with breath or blood evidence get an "approved test", then defendant's charged with DUI by controlled substance must get an "approved test" as well.

Therefore, whether this court accepts the grammatical construction argument or the Equal Protection argument, it is immaterial because clearly, the Respondent was entitled to equal protection under the law and if the law requires breath and blood tests to be "approved", then the law must also require urine tests to also be "approved". The Respondent made these alternative arguments in the lower court. (R. 43, 85).

By analogy, this court should consider it's argument from Traylor v. State. Traylor v. State , 596 So.2d 957 (Fla. 1992). This court in Traylor concluded that Florida Rule of Criminal Procedure 3.111 gives a right to

counsel to indigents and that to be constitutional the rights of non-indigents must be coextensive, thereby entitling non-indigents to the same rights. Traylor at 970. This same argument applies in this case. If those defendant's who are charged with DUI by alcohol are entitled to "an approved test" then so must the defendants who are charged with DUI by controlled substances. To say otherwise would entitle a class of defendant's to greater protection under the law and be violative of the equal protection clause.

B – Lack of sufficiency of the administrative rules.

The Florida Department of Law Enforcement pursuant to Florida Statute 316.1932 has adopted very specific guidelines regarding what is an "approved breath test" and what is an "approved blood test". FDLE has failed to take the same measures regarding urine. In fact, there is no urine test that has been subject to the formal promulgation process in compliance with the administrative procedures act. (See Exhibit A of Respondent's appendix. It is a copy of the implied consent rules in effect at the time of Bodden's arrest and they are silent regarding any urine test)

Courts through out Florida have recently held that lack of specificity in the Blood test rules renders the presumptions unavailable. State v. Miles, 25 Fla. Law Weekly S1082 (Fla. 2000), State v. Townsend, 746 So.2d 495

(2nd DCA 1999), Searles v. State, 750 So.2d 667 (2nd DCA 1999), State v. Sandt, 751 So.2d 136 (2nd DCA 2000).

The State argues in it's brief that Florida Statutes do not require an approved test and that there is no delegation authorizing FDLE to promulgate such rules. **This is incorrect**. (emphasis added). See Florida Statute 322.63(1) and 322.63(3)(a).

C – Florida Statute 322.63

Florida Statute 322.63(1) states in pertinent part:

> A person who accepts the privilege extended by the laws of this state of operating a commercial motor vehicle within this state, be deemed to have given his or her consent to submit to **an approved chemical or physical test of his or her blood, breath, or urine** …. for the purpose of detecting the presence of chemical substances … or of controlled substances. (emphasis added).

Additionally, Florida Statute 322.63(3)(a) states in pertinent part:

> The physical and chemical tests authorized in this section shall be administered substantially in accordance with **rules adopted by The Florida Department of Law Enforcement**.(emphasis added).

In 1993, FDLE took over the implied consent program from HRS. Included in the Respondent's appendix is a copy of the original rules that were in effect in 1993 (See Respondent's appendix C). Contained within

FDLE Rule 11D-8.001 entitled purpose – scope is the specific legislative authority citing to Florida Statute 322.63.

While the State claims that no authority exists for FDLE to promulgate rules for an approved urine test, this argument is clearly erroneous in light of Florida Statue 322.63. Additionally, the plain language of Florida Statute 322.63 requires an approved urine test, thereby rendering the State's argument invalid.

FDLE has clearly violated Florida Statute 322.63 because no urine test has been approved in accord with the Florida Administrative Procedures Act under Florida Statute 120.54. (See Respondent's appendix exhibit A - no rules exist supporting FDLE's requirement for an approved urine test pursuant to Florida Statute 322.63 under current implied consent rules)

The Respondent concedes that the statute in issue before this court is 316.1932. However, if commercial drivers are entitled to an approved urine test, then the rights of non-commercial drivers **must** be co-extensive. (emphasis added). Traylor at 970.

Adopting the previous argument relating to equal protection under the law, every driver must have the same entitlements and protection under Florida law. Therefore, Mr. Bodden was entitled to "an approved" urine test

Finally, in response to the State's argument on page 23 that breath/blood are different from urine and that's why no approved test is required for urine is also contradicted by Florida Statute 322.63.

D- The administrative procedures act, Florida Statute 120.50 , et seq.

FDLE has violated Florida law in two (2) separate ways. First, the procedure used for testing urine samples violates the administrative procedures act because it has never been properly promulgated in accord with the act, and second, that failure to promulgate an approved test violates Florida Statute 316.1932.

Administrative agencies, like the Florida Department of Law Enforcement, are required to follow the promulgation procedure requirements as spelled out in chapter 120 of the Florida Statutes when adopting rules. The act provides a framework for administrative agency action and contains detailed provisions governing the promulgation of agency rules.

Section 120.52(16) defines a "rule" as an:

> **Agency statement of general applicability that implements**, interprets, or prescribes laws or **policy** or **describes the organization, procedure or practice requirements of an agency and includes any form** which imposes any requirement or solicits any information not

> specifically required by statute or by an existing rule.(Emphasis added)

It is this provision of the act that supports the Respondent's argument that the use of the procedure used for testing urine samples violated the administrative procedures act.

At the time of the Respondent's urine test, there was no rule in place that had been subject to the promulgation process under chapter 120.50 et seq. detailing how urine samples should be tested. Rather, FDLE, through Mr. Dale Livingston, developed and used a process of testing urine samples that had never been subjected to the Administrative procedures act.. (R. 136-140, 178-185). This testing procedure that Mr. Livingston employed should have been promulgated because it clearly falls within the definition of a "rule" and FDLE's failure to properly promulgate the procedure constituted an invalid delegation of legislative authority.

The testing procedure that Mr. Livingston employed for testing urine samples, implemented policy and procedure requirements, and imposed requirements for the testing of urine samples that was not required by another statute or existing rule. Mr.Livingston established a procedure for testing urine to determine the presence of many different types of substances that every analyst in the State of Florida used. (R. 178-185). The procedures were to be followed uniformly. (R. 178-185). Therefore, the testing

procedure that Mr. Livingston developed and which was used by every analyst for FDLE statewide to test urine samples in Florida should have been subject to the formal promulgation process and the failure to do so violated the administrative procedures act.

The failure to promulgate the procedure to approve these testing procedures is a violation of the administrative procedures act. DOT v. Blackhawk Quarry, 528 So.2d 447 (5th DCA 1988), State v. Reisner, 584 So.2d 141 (5th DCA 1991), Dept of revenue v. Vanjaria Enterprises, 675 So.2d 252 (5th DCA 1996).

In Reisner, the Fifth DCA stated:

> 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. HRS must approve and specify the specific technology and methods for ensuring the accuracy of the machines used. It must do so by formally promulgating rules.

Reisner, supra. Therefore, FDLE was obligated to specify the procedure in accord with Reisner.

In Vanjaria, the court reviewed an equation to determine tax assessments. Vanjaria, supra. The court held that the procedure to determine the tax assessment constituted a rule and therefore should have been

promulgated. Vanjaria, Supra. Similarly, the procedure that Mr. Livingston used also constitutes a rule (A rule pursuant to Blackhawk Quarry is "an agency statement of general applicability that implements, interprets, or prescribes laws or policy or describes the organization, procedure or practice requirements of an agency and includes any form which imposes any requirement or solicits any information not specifically required by statute or by an existing rule, Blackhawk Quary, Supra.) and therefore, should have been promulgated. Vanjaria, Supra. In accord with the Vanjaria decision, FDLE's failure to promulgate the procedure for testing urine samples constitutes an invalid delegation of legislative authority and renders the testing procedure "unapproved".

E - The Traditional Predicate

The State requested the trial court to allow the State to admit the urine test results by using the traditional predicate. (R. 76, 77). In response, the Respondent argued that because he had been read an implied consent warning, his consent was not voluntary and therefore, the state could not use the traditional predicate. (R. 64-68). The trial court agreed with the Respondent and excluded the urine in accord with Polak. Polak, Supra.

The Second District’s affirmance on this point relying upon Polak is not erroneous.

The State's argument for it's use of the traditional predicate was misplaced. The State may use the traditional predicate as an alternative to the implied consent predicate under limited circumstances. The traditional predicate may only be used if a person voluntarily consented and provided the sample by a knowing and voluntary act.

There are many cases in Florida were courts have allowed the traditional predicate as an avenue of admission when there has been a violation of the implied consent law. But all of these cases involve a felony blood factual situation.

Breath and Urine are different than blood. The reason the State was permitted to use the traditional predicate in Bender, Robertson, and other cases was because consent is not an issue in a felony blood case. Pursuant to Florida Statute 316.1932, the State may take a blood sample by force in a death or serious bodily injury case. Both Bender and Robertson were DUI manslaughter or serious bodily injury cases. Robertson v. State of Florida, 604 So.2d 783 (Fla. 1992), State v. Bender, 382 So.2d 697 (Fla. 1980). However, breath and urine cannot be compelled or taken by force the same as blood. Florida Statute 316.1932 (1991).

The First DCA in Polak addressed this exact issue. State v. Polak, 598 So.2d 150 (1st DCA 1992). The Defendant, in Polak, was requested to

submit to an "approved" breath test. Polak, Supra. The breath machine had been modified and never re-tested, therefore, the court ruled that the Defendant had submitted to an "unapproved" breath test. Polak, supra. The breath test result was excluded under the implied consent predicate. Polak, Supra. The court went on to address the State's inability to use the traditional predicate because, as the court ruled, the Defendant did not voluntarily consent to the breath test. Polak, supra. The court determined that the Defendant had been mislead into believing that he was submitting to an "approved" test when he was not and therefore, his consent was involuntary. Polak, supra. The court ruled that the State may only use the traditional predicate in a breath case (and the Respondent believes the same logic applies to urine) if the Defendant voluntarily submits his/her breath sample for analysis. Polak, supra.

Because the implied consent is inherently coercive, if a Defendant is read an implied consent warning informing him/her that their license will be suspended if he/she refuses, then there is no voluntary consent and the state may not use the traditional predicate.

Judge Demers, from Pinellas County, has written a treatise on Florida DUI law. Florida DUI Handbook, David Demers and Jacqueline Gayle (West Group, 1999). [Exhibit B - Respondent's appendix].

The Second District Court has previously recognized the expertise of Judge Demers in DUI cases. State v. Berger, 605 So.2d 488 (2nd DCA 1992).

Judge Demers is recognized as one of the leading judicial scholars on Florida DUI law. On pages 100 - 102 of his treatise, Judge Demers discusses this exact issue of the state's use of the traditional predicate in a breath test case. He writes on the bottom of page 101:

> Such test results may be inadmissible because of noncompliance with some statutory or administrative testing provision. In such cases the court may, nevertheless, allow the results into evidence pursuant the traditional scientific predicate. However, if those samples were secured by advising the subject of the coercive elements of the implied consent law, **the results are inadmissible even if the state establishes that predicate**.(citation to Polak).

Therefore, if the Respondent was read an implied consent warnings, the state may not use the traditional predicate in this case. The Respondent was read an implied consent warning, therefore, the trial court has excluded the urine under the traditional predicate in accord with Polak. (R. 25-27).

F – Response to The State's arguments in her initial brief.

The State makes a few misplaced arguments.

First, that the legislature intended to treat breath and blood different from urine. The state's reliance upon this argument is misplaced. Florida Statute 316.1932 requires breath or blood for alcohol and urine for

controlled substances. So what! Just because the legislature required different forms of testing for different types of samples does not equate to the State's position that a urine test does not have to be "approved". The State's argument also fails to address the Respondent's arguments of equal protection.

Second, The State argues that no violation of due process has occurred because the Respondent did not challenge the scientific reliability. The fault with her position is that how can someone challenge the scientific issues if they have never been given notice of what those procedures are. Had the procedures been published in Florida Administrative Law Weekly as required by the APA, had there been a public hearing as required by the APA, had there been an opportunity to file written comments or objections after the public hearing as required by the APA, had the public been given a chance to have experts outside the FDLE evaluate the procedures, then we might be in a position to challenge the procedures from a scientific perspective. The State is assuming the reliability of the procedures but how is someone supposed to challenge something that they have not been given notice of. Therefore, it is the position of the Respondent that his due process rights were violated. Certainly his equal protection rights were violated because had he only been prosecuted by an impairment theory due to

alcohol, he would have received an “approved test”, but because he is being prosecuted with urine evidence, he isn’t entitled to an “approved test”, at least according to the State.

Third, the state’s argument regarding scientific reliability is irrelevant. The issue is whether there was a violation of the administrative procedures act. Scientific reliability only applies to whether the State may admit the results under the traditional predicate (assuming there was in fact a violation of the administrative procedures act and the urine is excluded under the implied consent predicate). If there was a violation of the APA, then the results should be excluded under the implied consent predicate. Then the next question to be answered is whether the state may then admit the results by the traditional predicate (assuming it can establish voluntary consent and scientific reliability to the procedures used).

CONCLUSION

Based upon the foregoing arguments and cited authorities, the Appelle's believe that the decision of the county court and the Second District Court should not be overturned. The trial court did not abuse it's discretion nor did the trial court fail to follow the law. Because the court's ruling is clothed in a presumption of correctness and there is competent evidence to support the trial court's rulings, the decision should be affirmed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of foregoing has been furnished by Hand delivery/mail/fax this _____ day of _____, 2003, to: Office of the Attorney General, 2002 North Lois Avenue, Suite 700, Tampa, Florida 33607.

I HEREBY CERTIFY that the font size in the motion is New Times Roman 14 point.

_____

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