IN THE SUPREME COURT OF FLORIDA

DEMELLO BOLWARE,

Petitioner,

Case No. SC04-12

v.

STATE OF FLORIDA,

Respondent.

RESPONDENT'S ANSWER BRIEF

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

ROBERT R. WHEELER
TALLAHASSEE BUREAU CHIEF,
CRIMINAL APPEALS
FLORIDA BAR NO. 0796409

EDWARD C. HILL, JR.
SPECIAL COUNSEL, CRIMINAL APPEALS
FLORIDA BAR NO. 0238041

OFFICE OF THE ATTORNEY GENERAL
PL-01, THE CAPITOL
TALLAHASSEE, FL 32399-1050
(850) 414-3300
(850) 922-6674 (FAX)

COUNSEL FOR RESPONDENT

TABLE OF CONTENTS

PAGE(S)

TABLE OF CITATIONS

FLORIDA STATUTES

OTHER

PRELIMINARY STATEMENT

Respondent, the State of Florida, the Petitioner in the District Court of Appeal (DCA) and the prosecuting authority in the trial court, will be referenced in this brief as Respondent, the prosecution, or the State. Petitioner, Demello Bolware, the Respondent in the DCA and the defendant in the trial court, will be referenced in this brief as Petitioner or proper name.

The record consists of the appendix to the certiorari petition filed in the District Court. It will be referenced according to “App.” followed by the respective page number designated in the Index to the Appendix. "IB" will designate Petitioner's Initial Brief. Each symbol will be followed by the appropriate page number in parentheses.

All emphasis through bold lettering is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

The State accepts petitioner’s statement of the case and facts as being generally supported by the record subject to the following additions:

The Circuit Court in its appellate capacity ruled as follows

> While counsel have cited a number of cases supporting their respective positions, this Court is inclined to apply common concepts to the relevant terms. “Direct” means immediate or

proximate-not remote. "Result" means consequence. Syllogistically: if you do "A" then "B" must follow.

If an agency is required to take an action "B" when a person enters a plea in court(A) then the administrative act is a direct consequence of that plea, and the failure to so advise renders counsel ineffective for the purpose of rule 3.850.

Cir. Court Opinion

SUMMARY OF ARGUMENT

ISSUE I

The First District Court of Appeal had jurisdiction to determine whether the Circuit Court departed from the essential requirements of law. Furthermore, the District Court correctly determined that the Circuit Court's failure to apply controlling Florida Supreme Court precedent and the Circuit Court's redefinition of what was a direct or collateral consequence of a plea were incorrect statements of the law. Therefore, the District Court properly exercised its authority in granting the petition for writ of certiorari.

ISSUE II

This Court has repeatedly held that in order for a consequence to be a direct consequence of a plea it has to have a **definite, immediate and largely automatic effect on the range of the defendant's punishment.** Major v. State, 814 So.2d 424 (Fla. 2002), State v. Partlow, 840 So.2d 1040 (Fla. 2003) As shown, it is well settled that revocation of a driver's license is not punishment but a civil administrative action designed to protect the public from the offender in the future. Zarsky v. State, 300 So.2d 261 (Fla. 1974) Therefore, the First District's result is dictated by Major as applied by this Court in Partlow. (registration as a sex offender was not punishment and therefore was a collateral consequence). See also State v.

Dickey, 31 Fla. Law Weekly S234 (Fla. April 20, 2006)(future enhancement of sentences) Therefore, this Court should affirm the decision of the First District. In doing so, it should maintain the long held position that revocation or suspension of a driver's license is not punishment, and a court as part of the plea process is not required to advise a defendant of the collateral consequence that the defendant's license could be revoked.

ARGUMENT

ISSUE I

WHETHER THE DISTRICT COURT OF APPEAL EXCEEDED ITS CERTIORARI AUTHORITY? (Restated)

Petitioner asserts that the District Court of Appeal exceeded its authority in granting the state's certiorari petition. Petitioner is wrong.

Standard of Review

The issue of whether the District Court of Appeal properly granted the certiorari petition is an issue of law which is reviewed de novo

Preservation

Petitioner argued in the District Court of Appeal that the Circuit Court applied the correct law.

Argument

Petitioner contends that the District Court of Appeals exceeded the scope of its jurisdiction by reversing the appellate decision of the Circuit Court. Petitioner is wrong. First of all, this is not a jurisdictional issue. The District Courts of Appeal have jurisdiction to entertain petitions for writs of certiorari. Art. V. § 3 Fla. Const. Moreover, Rule 9.030(b) Fla. R. App. P., provides that District Courts of Appeal have the authority to entertain certiorari petitions from

appellate decision of the Circuit Courts. Therefore, the District Court of Appeal had jurisdiction.

As to the District Court's authority, the state readily acknowledges that the Circuit Court acting in its appellate capacity is bound by decisions of a superior court. Pardo v. State, 596 So.2d 665 (Fla. 1992). The state also acknowledges that a District Court of Appeal reviewing a Circuit Court appellate decision can only reverse that decision if the decision departs from the essential requirements of law. Haines City Community Development v. Heggs, 658 So.2d 523 528-530 (Fla. 1995)

However, the first problem with petitioner's argument is that the Circuit Court acting in its appellate capacity did not follow the correct law. The Court in its opinion stated:

> While counsel have cited a number of cases supporting their respective positions, this Court is inclined to apply common concepts to the relevant terms. "Direct" means immediate or proximate-not remote. "Result" means consequence. Syllogistically: if you do "A" then "B" must follow.
>
> If an agency is required to take an action "B" when a person enters a plea in court(A) then the administrative act is a direct consequence of that plea, and the failure to so advise renders counsel ineffective for the purpose of rule 3.850.

Cir. Court Opinion

In essence, the Circuit Court ignored this Court's definition in Major and fashioned its own definition of what

amounts to direct consequence of a plea. Moreover, the Circuit Court's definition is contrary to the definition this Court approved in Major which is:

> "The distinction between 'direct' and 'collateral' consequences of a plea, while sometimes shaded in the relevant decisions, turns on whether the result represents a definite, immediate and largely automatic effect on the range of the defendant's punishment."

Major at 428.

The Circuit Court Order expanded this definition extending it to any consequence imposed by an administrative agency as a result of a plea. In doing so, the court ignored the language of Major which examines whether the result represents a definite, immediate and largely automatic effect on the **range of the defendant's punishment**. Thus, the Circuit Court did not follow the law and applied an incorrect definition of what amounts to a direct or collateral consequence of a plea. Therefore, the District Court of Appeal properly determined that the ruling departed from the essential requirements of law.

As to the allegation that the circuit court was bound by Prianti v. State, 819 So.2d 231 (Fla. 4th DCA 2002) and/or Daniels v. State, 716 So.2d 827 (Fla. 4th DCA 1998), appellant is wrong. A lower tribunal would be bound when presented with the same facts and the same issue of law presented in the case from another district. However, Prianti is not a case about failure

to advise, but is instead a case involving affirmative misadvice. Thus it involve a different principle of law. Likewise, Daniels does not involve the interpretation of §322.264 Fla. Stat., the habitual traffic offender statute. It involves the interpretation of a revocation imposed by a different statutory section which has a somewhat different structure. These cases may be instructive, but certainly not binding on the Circuit Court. Thus, to the extent that the Circuit Court relied on non-binding cases, the First District was free to determine that the reliance was a departure from the essential requirements of law.

The other problem with petitioner's argument is that the Circuit Court ignored this Court's cases which were controlling. The cases that were binding on the lower tribunal were Major, which set the standard to be applied, and Zarsky v. State, 300 So.2d 261 (Fla. 1974), which held that a license revocation pursuant to the habitual traffic offender statute was not punishment. The Circuit Court's failure to apply these cases amounted to a departure from the essential requirements of law and the First District did not exceed its authority in finding such.

The First District had jurisdiction to determine that the Circuit Court departed from the essential requirements of law.

Furthermore, the District Court correctly determined that the Circuit Court's failure to apply controlling Florida Supreme Court precedent and the Circuit Court's redefinition of what was a direct or collateral consequence of a plea were incorrect statements of the law. Therefore, the District Court properly exercised its authority in granting the petition for writ of certiorari.

ISSUE II

WHETHER A DEFENDANT ENTERING A PLEA TO A TRAFFIC OFFENSE MUST BE ADVISED THAT THE DEPARTMENT OF MOTOR VEHICLES MAY REVOKE HIS LICENSE AS A HABITUAL TRAFFIC OFFENDER ? (Restated)

Petitioner asserts that the trial court's failure to advise him that the Department of Motor Vehicles may administratively suspend or revoke his license as a habitual traffic offender renders his plea involuntary. Petitioner is wrong and this Court should deny relief.

Standard of Review

The issue of whether the District Court of Appeal properly interpreted the law relating to the suspension of driver's licenses is an issue of law which is reviewed de novo.

Preservation

Petitioner preserved this issue by challenging the voluntariness of his plea in a post conviction motion.

Argument

Petitioner contends that a license revocation by the Department of Motor Vehicles as a habitual traffic offender is a direct consequence of his plea. He also contends that in order for his plea to be voluntary the trial court must advise

defendant's of this possibility. Petitioner is wrong and this Court should deny relief.

Petitioner was convicted of driving on a suspended or revoked drivers license. The Department determined him to be a habitual traffic offender pursuant to Section § 322.264 Fla. Stat. which provides:

> § 322.264. "Habitual traffic offender" defined
>
> A "habitual traffic offender" is any person whose record, as maintained by the Department of Highway Safety and Motor Vehicles, shows that such person has accumulated the specified number of convictions for offenses described in subsection (1) or subsection (2) within a 5-year period:
>
> (1) Three or more convictions of any one or more of the following offenses arising out of separate acts:
>
> (a) Voluntary or involuntary manslaughter resulting from the operation of a motor vehicle;
>
> (b) Any violation of s. 316.193, former s. 316.1931, or former s. 860.01;
>
> (c) Any felony in the commission of which a motor vehicle is used;
>
> (d) Driving a motor vehicle while his or her license is suspended or revoked;
>
> (e) Failing to stop and render aid as required under the laws of this state in the event of a motor vehicle crash resulting in the death or personal injury of another; or
>
> (f) Driving a commercial motor vehicle while his or her privilege is disqualified.

> (2) Fifteen convictions for moving traffic offenses for which points may be assessed as set forth in s. 322.27, including those offenses in subsection (1).
>
> Any violation of any federal law, any law of another state or country, or any valid ordinance of a municipality or county of another state similar to a statutory prohibition specified in subsection (1) or subsection (2) shall be counted as a violation of such prohibition. In computing the number of convictions, all convictions during the 5 years previous to July 1, 1972, will be used, provided at least one conviction occurs after that date. The fact that previous convictions may have resulted in suspension, revocation, or disqualification under another section does not exempt them from being used for suspension or revocation under this section as a habitual offender.

§ 322.264

Petitioner's license was revoked pursuant to Section § 322.27(5) which provides:

> (5) The department shall revoke the license of any person designated a habitual offender, as set forth in s. 322.264, and such person shall not be eligible to be relicensed for a minimum of 5 years from the date of revocation, except as provided for in s. 322.271. Any person whose license is revoked may, by petition to the department, show cause why his or her license should not be revoked.

§ 322.27(5)

In the opening paragraphs of his argument, Petitioner misstates the test to be applied. Petitioner asserts that direct consequences are "direct, immediate, and largely automatic **results** of the plea." (I.B. 9) In Major v. State, 814 So.2d 424 (Fla. 2002), this Court adopted the test for

distinguishing between direct and collateral consequences of a plea which was articulated in the Fourth District's decision in Zambuto v. State, 413 So.2d 461 (Fla. 4th DCA 1982). This Court stated that:

> "The distinction between 'direct' and 'collateral' consequences of a plea, while sometimes shaded in the relevant decisions, turns on whether the result represents a **definite, immediate and largely automatic effect on the range of the defendant's punishment**."

Major at 428.

Major, which held that a defendant did not have to be advised that his sentence could be enhanced if he was convicted of additional offenses, was followed by this Court's decision in State v. Partlow, 840 So.2d 1040 (Fla. 2003). In Partlow, this Court reversed the Fourth District's determination that failure to advise a defendant of the requirement of registration as sex offender, although collateral, was a consequence of the plea that allowed the plea to be withdrawn. See Partlow v. State, 813 So.2d 999 (Fla. 4th DCA 2002). In reversing the Fourth District in Partlow, this Court held that sexual offender registration was not a punishment, and thus no matter how definite, immediate, or automatic, was not a direct consequence of the plea. Thus, the trial court did not err when it did not advise a defendant of that collateral consequence.

The instant case, presents a situation similar to Partlow. The First District applied this Court's precedent, and held that the revocation of a driver's license was not punishment. The District Court recognized that revocation is a public safety measure designed to protect the public in the future from an individual who has abused his driving privilege. The court reasoned that just as in Partlow, it did not matter whether the consequence was direct, because it was not punishment. Therefore, the trial court need not advise a defendant of the potential license revocation when he pleads to driving on a suspended or revoked license.

This ruling by the First District was based on a substantial body of case law. In Smith v. City of Gainesville, 93 So.2d 105 (Fla. 1957), this Court held that suspending a license for driving while intoxicated was not punishment of the defendant but a method of protecting the public from the dangerous behavior of the licensee. In Zarsky v. State, 300 So.2d 261 (Fla. 1974), this Court reiterated the principle that revocation of a license is not punishment. Like petitioner, Zarsky's license was suspended by the Department because he was a habitual traffic offender. This court stated such a suspension of a driving privilege is a civil administrative act

in compliance with legislative mandate dealing with a privilege, as opposed to a right.

These rulings have been followed by every District Court of Appeal. In fact, the Courts have uniformly and in a myriad of contexts held that revocation of the driver's license is a civil administrative proceeding designed to protect the public and is not punishment. The First District in Dep't of Highway Safety & Motor Vehicles v. Gordon, 860 So.2d 469 (Fla. 1st DCA 2003) stated:

> The administrative revocation of a driver's license for DUI is not "punishment" of the offender. See Dep't of Highway Safety & Motor Vehicles v. Grapski, 696 So. 2d 950, 951 (Fla. 4th DCA 1997). Rather "it is an administrative remedy for the public protection that mandatorily follows conviction for certain offenses." Id. (quoting Smith v. City of Gainesville, 93 So. 2d 105, 107 (Fla.1957)); see also Dep't. of Highway Safety and Motor Vehicles v. Vogt, 489 So. 2d 1168, 1170 (Fla. 2d DCA 1986). When a driver's license revocation is made mandatory by statute, revocation is an administrative function rather than the imposition of a criminal sentence. See Grapski, 696 So. 2d at 951.

Id at 471.

The Third District in Dep't of Highway Safety & Motor Vehicles v. DeGrossi, 680 So.2d 1093 (Fla. 3rd DCA 1996) adopted the same position. The Second District in a series of cases beginning with Dep't of Highway Safety & Motor Vehicles v. Vogt, 489 So.2d 1168 (Fla. 2nd DCA 1986) held that Smith controlled and

that revocation was an administrative remedy for the protection of the public. The decision in Vogt was followed in State v. Walters, 567 So.2d 49 (Fla. 2nd DCA 1990) and in McDaniel_v. State, 683 So.2d 597 (Fla. 2nd DCA 1996). There the Court held that the appellant could not challenge the revocation of his license through a Rule 3.800 motion because license revocations were administrative and not part of the sentence. The Fifth District likewise has held that revocation is not punishment. Dep't of Highway Safety & Motor Vehicles v. Hagar, 581 So.2d 214 (Fla. 5th DCA 1991), Davidson v MacKinnon 656 So.2d 223 (Fla. 5th DCA 1995), State v. Atkinson, 755 So.2d 842 (Fla. 5th DCA 2000)

Interestingly, the Fourth District subscribes to the same principles. In State v. Scibana, 726 So.2d 793 (4th DCA 1999), the Court held that revocation of a driver's license was not the imposition of criminal punishment but rather an administrative detail and could not be challenged pursuant to Rule 3.800. See also Dep't of Highway Safety & Motor Vehicles v. Grapski, 696 So.2d 950 (Fla. 4th DCA 1997)

The problem with the Fourth District's analysis in Daniel v. State, 716 So.2d 827 (Fla. 4th DCA) and Nordelus v. State, 889 So.2d 910 (Fla. 4th DCA 2004) was exposed by this Court in Partlow. Those Fourth District cases ignore the last part of the test adopted in Major which requires an effect on the range

of the defendant's punishment. The Fourth District's misapplication of the test is shown by this Court's reversal in Partlow and has been rejected by other District Courts. See Sullens v. State, 889 So.2d 912 (Fla. 5th DCA 2004).

Petitioner argues that the effect on punishment language should be abolished. Petitioner's argument would enormously expand the trial court's responsibility. Courts would have to advise a defendant of any possible consequence flowing from the plea. This would open the door to a flood of post conviction motions to withdraw pleas whenever a defendant finds some new consequence flowing from the plea. Courts would have to advise defendants that they may be denied such rights as the right to run for public office, to possess firearms, to vote, to receive a license to possess a concealed weapon, to obtain a alcoholic beverage license, to obtain a state scholarship and other matters unrelated to the punishment being imposed by the court.

Furthermore, this Court would have to reverse its decisions in Partlow, Major, and State v. Dickey, 31 Fla. Law Weekly S234 (Fla. April 20, 2006).

This Court has repeatedly held that in order for a consequence to be a direct consequence of a plea, it has to have a **definite, immediate and largely automatic effect on the range of the defendant's punishment.** Major v. State, 814 So.2d 424

(Fla. 2002), State v. Partlow, 840 So.2d 1040 (Fla. 2003). As shown, it is well settled that revocation of a driver's license is not punishment but a civil administrative action designed to protect the public from the offender in the future. Zarsky v. State, 300 So.2d 261 (Fla. 1974). The First District's result was dictated by Major as applied by this Court in Partlow. See also Westerheide v State 831 So.2d 93 (Fla. 2004) (which held that civilly committing sexually violent predators after their sentence had expired was not punishment). Therefore, this Court should affirm the decision of the First District. In doing so, it should maintain the long held position that revocation or suspension of a driver's license is not punishment, and a court as part of the plea process is not required to advise a defendant of the collateral consequence that the defendant's license could be revoked.

CONCLUSION

Based on the foregoing, the State respectfully submits the decision of the District Court of Appeal should be approved.

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to Jeffrey P. Whitton, Esq.; Post Office Box 1956, Panama City, Florida 32402, by MAIL on the _____ day of June, 2006.

Respectfully submitted and served,

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

_____
ROBERT R. WHEELER
Tallahassee Bureau Chief,
Criminal Appeals
Florida Bar No. 0796409

_____
EDWARD C. HILL, JR.
SPECIAL COUNSEL, CRIMINAL APPEALS
Florida Bar No. 0238041

Attorneys for State of Florida
Office of the Attorney General
Pl-01, the Capitol
Tallahassee, Fl 32399-1050
(850) 414-3300
(850) 922-6674 (Fax)

[AGO# L04-1-1668]

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements of Fla. R. App. P. 9.210.

_____
Edward C. Hill, Jr.
Attorney for State of Florida