SUPREME COURT OF FLORIDA

DEMELLO BOLWARE,

Petitioner,

vs. CASE NO.: SC04-12
LOWER CASE NO.: 1D02-4016

STATE OF FLORIDA,

Respondent.

REPLY BRIEF OF PETITIONER

ON APPEAL FROM

FIRST DISTRICT COURT OF APPEAL

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SUMMARY OF ARGUMENT

Suspension of driving privileges, when annexed to an adjudication, is indeed "punishment" in the ordinary usage of that word. Not only common sense but a review of Florida Statutes reveals numerous examples of this fact. Any number of cases going to jurisdictional issues saying that revocation of driving privileges is not "punishment" are simply saying the courts cannot control the Legislative or Executive branches when they impose certain sanctions. They do not apply in the context before the Court. Any competent counsel should warn a client facing repeat driving offenses of the existence of a potential impact on driving privileges.

ARGUMENT

ISSUE I

THE DISTRICT COURT EXCEEDED ITS CERTIORARI JURISDICTION IN THIS CASE.

Petitioner relies on the initial brief.

ISSUE II

WHETHER A NOLO PLEA TO A TRAFFIC OFFENSE THAT RESULTS IN A FIVE YEAR LICENSE SUSPENSION PURSUANT TO SECTION 322.27(5) IS VOLUNTARY UNLESS THE DEFENDANT HAS BEEN ADVISED OF THE AUTOMATIC SUSPENSION.

The core of this issue is not whether the suspension of driving privileges is a direct, or largely automatic, consequence of the criminal plea. The Circuit Court sitting in its appellate capacity so found, and no one has seriously argued otherwise. The true argument is whether a suspension of driving privileges is "punishment" as that word is applied in Major v. State, 814 So.2d 424 (Fla. 2002).

The petitioner has suggested in the initial brief, and still suggests, that common sense, and a common understanding of the consequences of traffic offenses would treat suspension of driving privileges as punishment. It is certainly far more than an "administrative step for the protection of the public" as suggested by counsel for the state. In fact, to many the ability to drive is the ability to get to work, or to perform a particular job, or to have access to shops, medical providers, or other necessities of life. The ordinary citizen attaches great value to driving privileges and considers their loss to be a serious sanction.

It seems the legislature agrees, and has associated loss of privileges with numerous non-traffic related offenses,

frequently unashamedly calling it punishment. See for example Fla. Stat. § 61.13016, (providing for the suspension of driving privileges when a support obligor has failed to comply with a subpoena or Order to Show Cause;) Fla. Stat. § 790.22(5)(a) (expressly makes suspension of driving privileges a part of the penalty for a minor being in a possession of a firearm;) Fla. Stat. § 948.01(3)(a) (specifically allows the Court to revoke or suspend a drivers license as part of a "community based sanction" during the course of community control plans;) Fla. Stat. § 984.09(4)(d) (expressly defining the suspension of a child's driving privileges as an appropriate punishment for contempt of court, as does Fla. Stat. § 985.216(4)(d).) Generally in delinquency cases the Court may revoke or suspend the child's drivers license, Fla. Stat. § 985.231(1)(a)(4). Finally, Fla. Stat. § 322.055 expressly requires the Court to direct the department to revoke driving privileges of any person 18 years of age or older convicted of possession or sale or conspiracy to possess, sell or traffic in <u>any</u> controlled substance. No nexus to driving is required for the operation of any of these statutes.

While, of course, these statutes do not apply to Mr. Bolware, and his offense was indeed traffic related, the various statutes' existence confirms the common understanding of the suspension of driving privileges as a severe punishment in this state.

In the broadest sense "punishment" is defined as imposition of a "penalty", which in turn is the deprivation of

some right, privilege, or property annexed to a legal decision. The automatic suspension of driving privileges certainly fits this description.

Contrary to the State's assertion, Petitioner is not asking this Court to recede from Major or State v. Partlow, 840 So.2d 1040 (Fla. 2003) or any other case. This Court is being asked only to clearly define "punishment" as used in those cases. Likewise, this Court need not disapprove of or recede from any of the line of cases determining a criminal court's jurisdiction over the Department of Highway Safety to dispose of this case. The Courts have jurisdiction over their own pleas. That is all that is at issue today.

The seminal case relied upon by the District Court of Appeal and the State in its brief is Smith v. City of Gainesville, 93 So.2d 105 (Fla. 1959). It was decided in an entirely different context and time. It was seriously argued that suspending a drivers license was beyond the power of the legislature, and beyond the power of the municipal court. No one is suggesting such a thing today, and to apply the logic of Smith, decided long before public defenders were required, to this situation is simply too far a stretch. Zarsky v. State, 300 So.2d 261 (Fla. 1974) again goes to the power of the legislature to order a suspension, an issue not in dispute herein. The use of the word "punishment" in that context is entirely different than the use of the word punishment when addressing the right to competent counsel.

The state also relies on a long line of cases, for example Dept. Of Highway Safety & Motor Vehicles v. Gordon, 860 So.2d 469 (Fla. 1st DCA 2003), Dept. Of Highway Safety & Motor Vehicles v. Degrossi, 680 So.2d 1093 (Fla. 3d DCA 1996), Dept. Of Highway Safety & Motor Vehicles v. Vogt, 489 So.2d 1168 (Fla. 2d DCA 1986), for the proposition that the criminal court lacks the jurisdiction to negotiate away or control the administrative sanction. Again, this is not an issue in dispute in this case, Mr. Bolware is not arguing the propriety of the suspension, given the conviction, instead he is arguing that the right to effective counsel would require counsel to warn him of these severe and automatic consequences of the plea.

In fact, it is the inevitability of the suspension that makes it so important for counsel to advise the defendant of the severe adverse consequences of the plea.

The State in essence is asking this court, due to the use of the word “punishment” in other contexts, to ignore the obvious reality as to the importance of driving privileges to the ordinary citizen. When the law is no longer in touch with common sense, it becomes a laughing stock, to be ignored. This Court should not divorce the law from common sense. Competent counsel would have at least warned Mr. Bolware of the potential impact of his plea on his driving privileges. When he did not, Mr. Bolware should have been allowed to withdraw his plea.

CONCLUSION

This court should quash the decision below, approve Daniels, Prianti, Whipple, and Nordelus, and disapprove Caswell and Sullens.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Initial Brief of Petitioner has been furnished to Dennis Beesting, Assistant State Attorney, Post Office Box 1040, Panama City, FL 32402, and Mr. Robert R. Wheeler and Mr. Edward C. Hill, Jr., Office of the Attorney General, The Capitol PL-01, Tallahassee, FL 32399-1050, by U.S. Mail, this 26th day of June, 2006.

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CERTIFICATE OF TYPEFACE COMPLIANCE

I hereby certify that this brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210.

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