IN THE SUPREME COURT OF FLORIDA

TOMESHA MARIE HOWARD,

Petitioner,

v. Case No. **SC05-1486**

STATE OF FLORIDA,

Respondent.
_____/

MERITS BRIEF OF PETITIONER

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PRELIMINARY STATEMENT

The record shall be referred to by the volume number in Roman numerals followed by the appropriate page number in Arabic numerals, both in parentheses.

STATEMENT OF THE CASE AND FACTS

By Information filed May 20, 2004, Howard (Petitioner) was charged with trafficking in hydrocodone and Oxycodone, possession of cocaine with intent to sell and/or deliver, introducing contraband into the jail, possession of not more than 20 grams of cannabis, and possession of paraphernalia for storage, with these offenses alleged to have occurred on or about April 16, 2004. (I-6-7).

On November 2, 2004, Petitioner filed a motion to suppress in the circuit court. (I-19-22). A hearing was held on this motion to suppress on November 19, 2004, and on November 22, 2004, the trial court rendered its order granting Petitioner=s motion to suppress evidence. (I-23-24).

On November 29, 2004, the State filed its notice of appeal. (I-26).

On August 5, 2005, the First District Court of Appeal issued its opinion reversing and remanding with instructions to deny the motion to suppress. State v. Howard, 909 So.2d 390 (Fla. 1st DCA 2005). In doing so, the First District Court of Appeal certified direct conflict with State v. Burke, 902 So.2d 955 (Fla. 4th DCA 2005).

On August 15, 2005, Petitioner filed her Notice to Invoke Discretionary Jurisdiction. On September 7, 2005, this Court

stayed the proceedings in this case pending disposition of Hilton v. State, Case No. SC05-438, which is pending in this Court. On November 3, 2005, this Court by written order postponed its decision on jurisdiction and ordered a stay of proceedings earlier entered by this Court on September 7, 2005, lifted and required Petitioner=s Initial Brief on the Merits to be served on or before November 28, 2005.

The following facts are taken from the transcript of the hearing held on November 19, 2004:

Alachua County Sheriff=s Deputy Joe Paul Hood conducted a traffic stop on the vehicle in which Petitioner was traveling on April 16, 2004. Hood was traveling in the outside lane east on State Road 20 when he attempted to pass the vehicle in which Petitioner was riding (which was also in the outside lane). As he did so, he looked to his right and noticed that the windshield was cracked. (II-8). Hood described the crack in the windshield as Alarge@ and to him it looked as if an object had hit the windshield and Aspidered@ it. (II-8-9). He believed that he could see it clearly because it was 5:32 p.m. (II-9).

Hood was unable to recall the total size of the crack. (II-11).

On cross-examination, Hood admitted that he was familiar with Petitioner and the driver of the vehicle (Lamonte Trace

Williams), because they went to Hawthorne High School, as he did. (II-11-12).

Hood did not dispute that in his deposition he had admitted that he could not describe the crack and that all that he knew was that it was within the Afour-by-eight size of the window.@ (II-12). Additionally, at this hearing, he could not describe the crack. (II-13).

Hood did not issue anyone a citation for the cracked windshield. (II-13).

Hood claimed that while he had stopped Petitioner several months before it was for a different traffic infraction. However, when pressed, he testified that he did not recall what the stop was for. Whatever it was for he did not issue her a citation at that time either. (II-14).

From the court=s questions, it was elicited from Hood that Petitioner was driving a Ford Escort and that while it was hard for Hood to remember, he believed that the crack was A... kind of in the center closer to the driver, if I remember right.@ (II-15). Hood admitted that his memory was A... somewhat vague.@ (II-15). Although Hood claimed that the crack was Asevere,@ he further admitted that it was Ahard for [him] to explain the severity of [the crack] or what it looked like because it was some time ago that it happened.@ (II-15).

When asked about his previous stop or stops of Petitioner, Hood testified that she was in the same vehicle but that he could not remember whether the windshield was cracked at that time or why he stopped her. (II-16). He did recollect that he did not give her a citation. (II-16).

On April 16, 2004, when he stopped her motor vehicle, she was not the driver; the driver was Lamonte Trace Williams. He did not give Williams a citation for the cracked windshield but he did detain Williams. (II-16-17). However, Williams was not arrested and he left the scene under Ahis own power@ [to use the court=s phrase]. (II-17). This was after the car was searched, drugs were found, and the Petitioner was arrested. Hood allowed someone to drive the car home (by family members of either the driver or Petitioner). (II-17). This was approximately an hour after the traffic stop when it was still daylight. (II-18).

Hood admitted that he had a camera in his patrol car but that it had never worked properly so [he didn=t take a picture of the windshield]. (II-18). Although other deputies arrived in their patrol cars, their cars might or might not have been equipped with cameras. (II-19).

The only reason that he stopped the car [was for the cracked windshield]. (II-20).

On behalf of Petitioner, Tommy C. Howard, Jr., testified that Petitioner was his daughter, that he was familiar with her vehicle, and that it was a 1994 Ford Escort. (II-22).

He was aware that the windshield had a hairline crack in it A[p]robably two plus years prior to ownership, and at least a year after ownership.@ His daughter had owned the vehicle for over a year to a year-and-a-half. He had seen the vehicle close in time to April 16, 2004, and he estimated that the crack was approximately 14 inches long. (II-23-24). He drew a diagram of the windshield, the rear view mirror, and the crack with its location. This was admitted into evidence as the court=s exhibit #1. (Record; II-28).[1]

Howard indicated that the crack was on the passenger=s side but not in the passenger=s view and that there was only one crack. Howard had previously sat in the driver=s seat and had not observed the crack unless you looked over to where you could see it. The crack did not interfere with his vision or the ability to operate the vehicle. (II-25).

Finally, Howard testified that he replaced the windshield a day or two after April 16, 2004. He did so because he got

[1] The exhibit shows the crack as a straight but angled line at approximately 45 degrees in the northeast quadrant of the windshield below the rear view mirror and on the passenger=s side. In handwritten notation, it is indicated that the crack is 14 inches.

tired of his daughter being stopped by Officer Hood in the car. (II-26).

Howard also, when asked, testified that he believed that his daughter had probably been stopped three times prior to this incident by Deputy Hood but he did term this as Ahearsay@ because his daughter would come into the house during the week upset that Hood had stopped her again for Ano reason.@ (II-27).

In ruling, the court, based upon the evidence, made the following factual finding that the crack did not present a safety hazard:

> And Deputy Hood is honest enough and frank enough to say that he doesn=t remember much about it [the crack], and that because of a malfunctioning or nonfunctioning camera, he didn=t have a photograph. Deputy Hood knows what the lawyers know, and because of his training and what I know as a judge, and that is that in a motion to suppress evidence, if it=s a warrantless search, the State, the police have the burden of proof. And thus as a trained professional, it=s his responsibility to gather the evidence and preserve the evidence, which is done with a camera. There were at least two on the scene, or should have been. And that evidence wasn=t gathered.
>
> Frankly, that would sure make it easy for us if we had a photograph. Because if there was a photograph that demonstrated that the cracked windshield created a safety issue, there would be no problem. If there was a photograph that indicated it didn=t create a safety issue, there=d be no problem.
>
> Based upon his lack of memory and the lack of evidence and based upon the uncontradicted testimony of Mr. Howard, who testified that he=s very familiar with this car and observed it at the time of the incident or soon following the incident, and that the crack was a 14-inch hairline crack basically on the passenger=s side, and in the diagram that he drew for

me, actually above eye level, this court finds as a matter of fact that it did not create a safety issue. And no reason to believe that the vehicle was unsafe, based upon the evidence presented.
[Emphasis added; II-34-35].

SUMMARY OF ARGUMENT

Deputy Hood stopped the vehicle in which Petitioner was traveling because there was a crack in the windshield. At the hearing held on the motion to suppress, Deputy Hood was unable to objectively describe the crack. Deputy Hood did not issue the driver of the car a citation for a cracked windshield and subsequently allowed the car to be driven away in the same condition it was stopped.

The trial court granted the motion to suppress on the basis that there was no safety hazard presented because of the crack in the windshield and Florida law did not allow the stop of a vehicle merely because the windshield was cracked where it did not present a safety hazard.

In Hilton v. State, 901 So.2d 155 (Fla. 2nd DCA 2005), the Second District Court of Appeal wrongly concluded that a visibly cracked windshield allowed a police officer to stop and perform a safety inspection on a vehicle. Recognizing the impact of this ruling, the Second District Court of Appeal certified as a question of great public importance whether a police officer could constitutionally conduct a safety inspection stop under Section 316.610 merely because the officer had observed a cracked windshield. State v. Burke, 902 So.2d 955 (Fla. 4th DCA 2005), reached the opposite result, and certified direct

conflict with Hilton to this Court. Both of these cases are presently pending in this Court. In this case, the Florida First District Court of Appeal wrongly sided with Hilton and certified direct conflict with Burke to this Court.

Florida law does not allow a safety stop of a vehicle merely because a windshield is cracked. Unless the crack in the windshield constitutes a safety hazard, a vehicle with a cracked windshield does not violate the provisions of Section 316.610, Florida Statutes. In Doctor v. State, 596 So.2d 442 (Fla. 1992), this Court has already rejected a similar argument. Doctor is still valid law because the officers in Doctor had neither reasonable suspicion of criminal activity nor a valid basis for a traffic stop.

This Court should approve the opinion of State v. Burke, disapprove of the opinions of Hilton and Howard, and remand with directions to affirm the trial court=s granting of Petitioner=s motion to suppress.

ARGUMENT

ISSUE

> THE TRIAL COURT DID NOT ERR IN GRANTING PETITIONER=S MOTION TO SUPPRESS EVIDENCE BY FINDING THAT THE INITIAL STOP OF THE VEHICLE IN WHICH SHE WAS A PASSENGER FOR A CRACKED WINDSHIELD WAS UNLAWFUL BECAUSE IT DID NOT PRESENT A SAFETY HAZARD.

Standard of Review:

In a motion to suppress, the facts found by the trial court are presumed correct if supported by competent substantial evidence in the record. The application of the law to the facts is *de novo*. Connor v. State, 803 So.2d 598, 608 (Fla. 2001).

Argument:

Procedural History:

At the time that the trial court ruled in this case, Hilton v. State, 29 Fla. L. Weekly D1475 (Fla. 2nd DCA 2004)[Hilton I, now withdrawn], was the law. Subsequently, Hilton v. State, 901 So.2d 155 (Fla. 2nd DCA 2005)[*en banc*], was issued [Hilton II] and the earlier panel opinion was withdrawn. The Second District Court of Appeal certified the following question as a matter of great public importance to this Court:

> MAY A POLICE OFFICER CONSTITUTIONALLY CONDUCT A SAFETY INSPECTION STOP UNDER SECTION 316.610 AFTER THE OFFICER HAS OBSERVED A CRACKED WINDSHIELD, BUT BEFORE

THE OFFICER HAS DETERMINED THE FULL EXTENT OF THE CRACK?

That case (and question) is presently pending in this Court. Hilton v. State, SC05-438.

State v. Burke, 902 So.2d 955 (Fla. 4th DCA 2005), disagreed with Hilton II and certified direct conflict to this Court. Burke is also presently pending in this Court. State v. Burke, SC05-1173.

The lower court in this case granted Petitioner=s motion to suppress on the basis that the traffic stop of the vehicle in which she was riding was not valid because the crack in the windshield did not present a safety hazard. The Florida First District Court of Appeal in State v. Howard, 909 So.2d 390 (Fla. 1st DCA 2005), sided with Hilton II and certified direct conflict with Burke.

The Facts:

The facts are simple. Alachua County Sheriff=s Deputy Hood, in broad daylight, allegedly stopped a vehicle in which Petitioner was riding because he observed a crack in the windshield. Deputy Hood, at the hearing held on the motion to suppress, could not describe the crack other than to refer to his report A... that the windshield was severely cracked.@ (II-10). At an earlier deposition, he was unable to describe the

crack. (II-12). He failed to document the crack with a camera even though he apparently had one although he indicated that the camera had never worked. (II-18-19). He did not issue a citation to the driver of the car and he subsequently (approximately an hour later) allowed the car to be driven home in the condition that he stopped it. (II-17).

The father of the Petitioner, when he testified, drew a picture of the windshield and identified the crack=s location and length (14 inches according to his estimate). The court made this an exhibit. (II-28). Petitioner=s father testified that he had previously sat in the driver=s seat and that the crack did not interfere with his vision or ability to operate the vehicle. (II-25).

The court made a factual finding that the crack in the windshield did not create a safety issue and there was no reason to believe that the vehicle was unsafe based upon the evidence presented. (II-35). In the direct appeal to this case, the State agreed that there was competent substantial evidence to support this finding. (ppellant=s Initial Brief in the First District Court of Appeal at 12-13).

Legal Issue:

Below, the State, in its initial brief, framed the legal issue as to whether a cracked windshield is in and of itself enough under the Fourth Amendment to permit the lawful traffic stop of the vehicle by law enforcement. This is essentially the same issue certified as a question of great public importance by Hilton. Petitioner asserts that a cracked windshield that does not present a safety hazard does not allow a valid stop of a vehicle by law enforcement. As such, Petitioner adopts and incorporates herein all of the legal arguments made by Petitioner Tristan Hilton in his initial and reply briefs in Case No. SC05-438. Petitioner also adopts and incorporates herein all of the arguments reflected in the dissent to the *en banc* opinion of Hilton II, and the arguments made by the Fourth District Court of Appeal in State v. Burke.

Discussion of the Law and Application of the Law to the Facts:

Under Whren v. United States, 517 U.S. 806, 116 S. Ct. 1769, 135 L. Ed. 2d 89 (1996), officers have probable cause to stop a vehicle that is going down the highway only if the circumstances confronting them support the reasonable belief that the driver has committed a crime or traffic infraction. Here, because the hairline crack in the windshield in which Petitioner was riding

did not constitute a safety hazard, Deputy Hood did not have a reasonable suspicion or probable cause to believe that a traffic in fraction had occurred. This is simply because, as Judge Northcutt observed in his dissenting opinion in Hilton II, Florida law does not prohibit a driver to drive with [merely] a cracked windshield:

> In short, the notion that the statutes of Florida - - or of any other state, for that matter - - require that windshields be free of all cracks is simply untrue. The majority=s assertion that Florida courts have held to the contrary is plainly wrong. The majority cites four cases involving searches following traffic stops for cracked windshields. In none of these cases was the propriety of the stop even at issue. [The dissent goes on to distinguish these cases.]
>
> * * *
>
> None of the opinions in those cases described the windshield cracks giving rise to the stops. This is significant because ... a windshield crack might violate the other prohibition in section 316.610 if its location or severity places the vehicle Ain such unsafe condition as to endanger any person or property.@ For this reason, a court=s simple observation that a motorist was stopped for having a cracked windshield in violation of Florida law in no way suggests that Florida law prohibits every windshield crack.
>
> Most telling, none of these opinions cited to a statute that requires windshields to be free of all cracks, because *there is none*.
>
> [Hilton II at 901 So.2d 155, 166].

Driving with a cracked windshield does not violate Florida law and driving a car with the crack described in this case does not violate Section 316.610, Florida Statutes, because the trial

court specifically found, and the facts support, that the fact did not present a safety hazard.

Section 316.610, Florida Statutes, in pertinent part, provides:

> **316.610 Safety of vehicle; inspection**.-It is a violation of this chapter for any person to drive or move, or for the owner or his or her duly authorized representative to cause or knowingly permit to be driven or moved, on any highway any vehicle or combination of vehicles which is in such unsafe condition as to endanger any person or property, or which does not contain those parts or is not at all times equipped with such lamps and other equipment in proper condition and adjustment as required in this chapter, or which is equipped in any manner in violation of this chapter, or for any person to do any act forbidden or fail to perform any act required under this chapter.
>
> (1) Any police officer may at any time, upon reasonable cause to believe that a vehicle is unsafe or not equipped as required by law, or that its equipment is not in proper adjustment or repair, require the driver of the vehicle to stop and submit the vehicle to an inspection and such test with reference thereto as may be appropriate.
>
> (2) In the event the vehicle is found to be in unsafe condition or any required part or equipment is not present or in proper repair and adjustment, and the continued operation would probably present an unduly hazardous operating condition, the officer may require the vehicle to be immediately repaired or removed from use. However, if continuous operation would not present unduly hazardous operating conditions, that is, in the case of equipment defects such as tailpipes, mufflers, windshield wipers, marginally worn tires, the officer shall give written notice to require proper repair and adjustment of same within 48 hours, excluding Sunday.

The first unnumbered paragraph of the statute is the operative section. Petitioner=s vehicle did not violate any

portion of this section of the statute because, as the trial judge found, the car was not in an unsafe condition so as to endanger any person or property, nor was there any testimony that the car did not contain the required lamps or other equipment in proper condition and adjustment as required in Ch. 316, or that the driver or the owner performed any forbidden act by this chapter or failed to perform any act required under this chapter. Specifically, it should be noted that under these facts, Deputy Hood did not issue the driver of the vehicle a citation, and Deputy Hood allowed the vehicle to be driven away after it was stopped.

No doubt the State will rely upon subparagraph (1) of Section 316.610 but this reliance is improvident because this subparagraph merely implements the violation described in the unnumbered portion of the statute. Hence, because the crack in the windshield in this case did not present a safety hazard, Deputy Hood did not have reasonable cause to believe that the vehicle in which Petitioner was riding was not safe nor equipped by law nor contained equipment that was not in a proper adjustment or repair.

Clearly, the State can not reasonably contend that any crack is justification for a traffic stop by law enforcement for a safety inspection. This issue has already been considered and

rejected by Doctor v. State, 596 So.2d 442 (Fla. 1992). In construing this same statute in reference to a cracked tail light, this Court in Doctor stated:

> The State argues that Section 316.110 allows police to stop a vehicle for malfunctioning equipment, even if the equipment is not required by statute, poses no safety hazard, or otherwise violates no law. We do not agree. Such an interpretation of Section 316.110 would allow police to stop vehicles for malfunctioning air conditioners or even defective radios, a result clearly beyond the statute=s intended purpose of ensuring the safe condition of vehicles operating on our state streets and highways.
> [Doctor at 447].

Thus, under Doctor, the stop of the vehicle in which Petitioner was riding with a crack in the windshield that presented no safety hazard was invalid.

In State v. Burke, the Fourth District Court of Appeal observed:

> If the majority opinion in ***Hilton*** is correct, it would follow that the stop in the present case for the crack in the windshield was proper. The correctness of ***Hilton***, may depend on whether ***Doctor v. State***, 596 So.2d 442 (Fla. 1992), is still good law in light of ***Whren v. United States***, 517 U.S. 806, 116 S. Ct. 1769, 135 L. Ed. 2d 89 (1996).
>
> In ***Doctor***, the Florida Supreme Court held that a crack in the lens of a taillight was not a proper basis for the stop of a car because the taillight was still emitting red light in compliance with the statutory requirement for a taillight. Our supreme court held in ***Doctor*** that a reasonable officer would have known that the taillight was still in compliance with the law. The majority in ***Hilton*** recognized the significance of ***Doctor***, but noted that it was decided prior to ***Whren***. In ***Whren***, the United States Supreme

> Court held that, when determining whether the stop of a vehicle is proper, the standard is whether the officer could have had a reasonable belief that the driver committed a crime or traffic infraction, and that the subjective intent of the officer involved was not relevant.
>
> We conclude that *Doctor* is still good law and that the majority opinion in *Hilton* is inconsistent with *Doctor*. Judge Northcutt, in his dissent in *Hilton*, has explained all of this in more detail, and we adopt his reasoning. Although the trial court ruled in this case before *Hilton* was decided, the court's conclusion that the state had not met its burden of demonstrating that the crack in the windshield was a safety problem is consistent with *Doctor*.
> [902 So.2d at 956-957].

Regarding the validity of Doctor, note carefully two points:

(1) Whren, as pointed out by the Fourth District Court of Appeal, validated a traffic stop regardless of the subjective intent of the officer as long as the officer had a reasonable belief that the driver had committed a crime or traffic infraction. Note carefully that the stop in Doctor did not violate the requirements of Whren:

> In sum, there can be no question that the stop here was pretextual since police had neither reasonable suspicion of criminal activity nor a valid basis for a traffic stop. Because the stop is illegal, the seizure was invalid and the cocaine should have been suppressed.
> [Doctor at 447].

Thus, in Doctor, reasonable suspicion of criminal activity did not exist nor was there a valid basis for a traffic stop.

Here, the same conditions obtain: Neither reasonable suspicion of criminal activity existed nor was there a valid basis for a traffic stop because the crack in the windshield did not present a safety hazard and did not violate Florida law.

Second, this Court, has recognized that reasonable suspicion is not judged by a subjective standard but by an objective one. Doctor at 447.

The burden on this warrantless stop was on the State, as observed by the trial judge. As the trial judge noted it was the State=s responsibility to gather the evidence and to preserve it. That simply was not done and the evidence that was presented did not establish that Deputy Hood had a reasonable belief the traffic infraction had occurred. (II-35).

As such, the trial court=s order granting the motion to suppress should be affirmed, and the First District Court of Appeal=s opinion in this case should be reversed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a copy of the foregoing has been furnished by U.S. Mail to **BRYAN JORDAN**, Assistant Attorney General, The Capitol, Tallahassee, Florida 32399-1050, and to Petitioner, **TOMESHA MARIE HOWARD**, Post Office Box 835, Hawthorne, FL 32640-0835, on this day, November 28, 2005.

CERTIFICATE OF FONT SIZE

I HERBY CERTIFY that, pursuant to Rule 9.100(1), Fla. R. App. P., this brief was typed in Courier New 12 point.

Respectfully submitted,

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APPENDIX TO MERITS BRIEF OF PETITIONER

APPENDIX	DOCUMENT
A	State v. Howard, 909 So.2d 390 (Fla. 1st DCA 2005)