

## IN THE SUPREME COURT OF FLORIDA

In re:           Standard Jury Instructions  
                  In Criminal Cases (No. 2005-6)

Case No. SC05-1651

Bob Dillinger, Public Defender for the Sixth Judicial Circuit, files the following comments to Proposal 3, styled as 28.11 Driving While License Suspended, Revoked or Canceled With Knowledge, and states as follows:

- 1)     In the proposed instruction under Florida Statute 322.34, the jury instruction notes that “Whether the defendant knew of the [suspension], [revocation], [cancellation] is a question to be determined by you from the evidence.”
  
- 2)     The jury instructions then proceed to utilize the statutory criteria in Florida Statute 322.34(2). The pertinent portion of that statute reads as follows: “The element of knowledge is satisfied if the person has been previously cited as provided in subsection (1); or the person admits to knowledge of the cancellation, suspension, or revocation; or the person received notice as provided in subsection (4). There shall be a rebuttable presumption that the knowledge requirement is satisfied if a judgment or order as provided in subsection (4) appears in the department’s records

for any case except for one involving a suspension by the department for failure to pay a traffic fine or for a financial responsibility violation.”

3) The proposed jury instructions read as follows:

“Proof that there exists an entry in the records of the Department of Highway Safety and Motor Vehicles showing that notice of the [suspension] [revocation] [cancellation] was given by personal delivery is proof that such notice was given.

Proof that there exists an entry in the records of the Department of Highway Safety and Motor Vehicles showing that notice of the [suspension] [revocation] [cancellation] was deposited in the United States mail, first class postage prepaid, addressed to the licensee at his or her last known mailing address furnished to the department, is proof that such notice was sent.

If you find that (Defendant) had been previously cited for driving while license [suspended] [revoked] [canceled], you may conclude that (Defendant) knew of the [suspension] [revocation] [cancellation].

If you find that (Defendant) admitted to knowing of the [suspension] [revocation] [cancellation], you may conclude that (Defendant) knew of the [suspension] [revocation] [cancellation].

If you find that (Defendant) had received a traffic citation that contained a provision notifying (Defendant) that [his] [her] license had been suspended, revoked, or cancelled, you may conclude that (Defendant) knew of the [suspension] [revocation] [cancellation].

If you find that (Defendant) had received a [judgment] [order] rendered by [a court] [an adjudicatory body] which contained a provision notifying (Defendant) that [his] [her] license had been [suspended] [revoked] [canceled], you may conclude that (Defendant) knew of the [suspension] [revocation] [cancellation].

If you find that the records of the Department of Highway Safety and Motor Vehicles include a [judgment] [order] rendered by [a court] [an adjudicatory body] which contains a provision notifying (Defendant) that [his] [her] license had been [suspended] [revoked] [canceled], you are permitted to assume that (Defendant) knew [his] [her] license had been [suspended] [revoked] [canceled]. This presumption, however, is rebuttable, and you may accept or reject the presumption depending upon the circumstances of the crime and the facts presented at trial.”

- 4) It is respectfully submitted that the proposed jury instructions improperly shift the burden of proof, are an improper comment by the court on the

- evidence and are violative of Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L.Ed.2d 177 (2004).
- 5) In Whitfield v. State, 452 So.2d 548 (Fla. 1984), this court indicated that a trial court should scrupulously avoid commenting on the evidence in a case. Especially in a criminal prosecution, a trial court should take great care not to intimate to the jury that the court's opinion as to the weight, character or credibility of any evidence adduced. See also Edwards v. State, 603 So.2d 89 (Fla. 5<sup>th</sup> DCA 1992). In all but one of the proposed jury instructions, the court would be instructing the jury that the jurors "may conclude" certain facts that the prosecution had to prove beyond a reasonable doubt. This not only is a comment on the evidence but is an improper shifting of the burden of proof from the prosecution.
- 6) One of the proposed jury instructions reads as follows: "If you find that (Defendant) had been previously cited for driving while license [suspended] [revoked] [canceled], you may conclude that (Defendant) knew of the [suspension] [revocation] [cancellation]." Nowhere in that proposed jury instruction is there any indication that the previously cited suspension was in fact the suspension for which the Defendant is on trial. Under this jury instruction, the jury "may conclude" that the Defendant

had knowledge even though the Defendant had received a citation years before and had had his driver's license reinstated. There is no logical connection to the situation of a person having been previously cited for driving while license suspended, having the license reinstated and then receiving a subsequent suspension, and the Defendant having knowledge of the subsequent suspension.

- 7) If the proposed jury instructions are an attempt to allow the records of the Department of Highway Safety and Motor Vehicles to be admitted without opportunity to confront and cross examine records custodians, the proposed jury instructions would be violative of Crawford v. Washington, as interpreted in Shiver v. State, 900 So.2d 615 (Fla. 1<sup>st</sup> DCA 2005), and Belvin v. State, 30 Fla. L. Weekly D1431 (Fla. 4<sup>th</sup> DCA June 8, 2005).

Wherefore, the following comments are respectfully submitted to this court.

---

Bob Dillinger, Public Defender  
Sixth Judicial Circuit of Florida  
14250 49<sup>th</sup> St. No., Clearwater, Fl 33762  
727-464-6866, FAX 727-464-6900  
SPN 172, Florida Bar No. 210641

## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been furnished to the Executive Director, The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399-2300, and the committee chair, Judge Dedee S. Costello, Bay County Courthouse, P.O. Box 1089, Panama City, Florida 32402-1089 on this the 14<sup>th</sup> day of November, 2005.

## CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing was generated in Times New Roman 14 and complies with the font requirements of Rule of Appellate Procedure 9.210, and that the foregoing was electronically submitted in compliance with AOSC04-84.

---

Bob Dillinger, Public Defender  
Sixth Judicial Circuit of Florida  
14250 49<sup>th</sup> St. No., Clearwater, Fl 33762  
727-464-6866, FAX 727-464-6900  
SPN 172, Florida Bar No. 210641