IN THE SUPREME COURT OF FLORIDA

Case No. SC05-438

TRISTAN HILTON,
Petitioner,

v.

THE STATE OF FLORIDA,
Respondent.

ON DISCRETIONARY REVIEW FROM THE
SECOND DISTRICT COURT OF APPEAL

REPLY BRIEF OF PETITIONER

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INTRODUCTION

Mr. Hilton relies upon the Introduction and Statement of the Case and Facts set forth in his initial brief.

ARGUMENT

THE TRIAL COURT ERRED IN DENYING MR. HILTON'S MOTION TO SUPPRESS WHEN THE STOP OF HIS VEHICLE WAS BASED SOLELY ON THE FACT THAT HIS WINDSHIELD WAS CRACKED AND NOT ON ANY BELIEF THAT THE CRACKED WINDSHIELD CAUSED MR. HILTON'S VEHICLE TO BE IN AN UNSAFE CONDITION THAT ENDANGERED A PERSON OR PROPERTY.

A RECENT FLORIDA CASE LAW

Mr. Hilton initially notes that subsequent to the filing of his initial brief in this cause, the Fourth District Court of Appeal, in *State v. Burke*, 902 So. 2d 955 (Fla. 4th DCA 2005), rejected the rationale expressed by the Second District in the present case and instead indicated its agreement with Judge Northcutt's dissenting opinion and the position asserted by Mr. Hilton. In *Burke*, a stop was based on a cracked windshield, but the record did not make clear the extent of the crack.[1]

[1] Although a detective initially testified that the windshield was badly cracked and very noticeable, he was unable to say where on the windshield the crack was located or the length, size, or shape of the crack. 902 So. 2d at 956. He further stated that he had "'made so many stops on cracked windshields, and seen so many cracked windshields, I didn't note it in my report.'" *Id.* A second detective remembered the existence of a crack, but was unable to recall any details about it, while the owner of the car testified that there was "a very small crack" on the passenger's side of the windshield. *Id.*

The Fourth District stated that the correctness of the decision under review here "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 (1996)" and concluded "that *Doctor* is still good law and that the majority opinion in *Hilton* is inconsistent with *Doctor.*" 902 So. 2d at 957. The court then said, "Judge Northcutt, in his dissent in *Hilton*, has explained all of this in more detail, and we adopt his reasoning." *Id.* The court thus agreed with the trial court's determination that "the state had not met its burden of demonstrating that the crack in the windshield was a safety problem." *Id.*

The district courts of this state are therefore now evenly split on this issue.[2]

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[2] This is true despite the decision in *State v. Breed*, 30 Fla. L. Weekly D1457 (Fla. 5th DCA June 10, 2005). That opinion did cite to the Second District's decision here in support of its statement that numerous Florida cases have held that a traffic stop does not violate the Fourth Amendment if an officer stops a motor vehicle "for the non criminal infraction of driving with a cracked windshield." *Id.* at D1458. That statement was merely dicta, however, as the case was not concerned with the propriety of the stop. Rather, it was a state appeal from a trial court decision finding the stop proper, but suppressing evidence due to its conclusion that the officers searched the vehicle for an unreasonable amount of time. The defendant did not seek to challenge the trial court's ruling regarding the stop by a cross-appeal pursuant to Florida Rule of Appellate Procedure 9.140(b)(4). Thus, the question of whether the stop was lawful was not before the court and was not considered by the court. Underscoring the fact that the Fifth District's statement regarding the stop was dicta is the fact that the court referred

B THE STATE'S STRAW MAN

A key aspect of the state's position is based on the assumption that Mr. Hilton is arguing that police officers cannot make stops for cracked windshields unless they have already determined that vehicles are unsafe. As asserted on page 16 of the state's brief:

> The interpretation Petitioner advocates would render § 316.610(1) and (2) meaningless in that an officer would not be able to stop a vehicle with a cracked windshield in order to submit it to an inspection to determine whether the vehicle is, in fact, unsafe. According to Petitioner, that determination must be made prior to stopping the vehicle.

The state returned to its effort to frame the issue in light of the above assumption on page 35 of its brief, stating:

> According to Petitoner's reasoning, officers would be permitted to stop only those vehicles that are obviously unsafe.

The state has mischaracterized Mr. Hilton's position and, in doing so, has created a "straw man" argument that it can

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to the infraction of driving with a cracked windshield. This reference clearly indicates that the court did not analyze the issue of the propriety of the stop because, as discussed in Mr. Hilton's initial brief, there is no question that there is no such violation. Moreover, it should be realized that the Fifth District also supported its statement by citing to ***K.G.M. v. State***, 816 So. 2d 748 (Fla. 4th DCA 2002). To whatever extent ***K.G.M.*** in fact stood for the principle espoused by the Fifth District, it can no longer be deemed valid in light of the Fourth District's subsequent decision in ***Burke***, decided two days before ***Breed.***

knock down. Mr. Hilton's actual position, however, does not yield so easily.

Mr. Hilton does not contend that an officer must know that a vehicle is unsafe, and thus in violation of the statute, in order to make a stop. Rather, the officer must have a reasonable or founded suspicion that such a violation is occurring. The mere fact of a crack, without more, cannot constitute such a suspicion because it is clear that not all cracks are violations. Thus, some factor other than the mere existence of a crack—-often length or location or both-—must also be present to justify a stop. Under facts such as those presented here or in *Burke*, which involve only a crack and no indication that the vehicle is unsafe, a stop is not lawful.[3]

The decision in *Burke* properly applies the principle urged by Mr. Hilton. It correctly characterizes the holding in *Whren v. United States*, 517 U.S. 806, 116 S.Ct. 1769, 135 L.Ed. 2d 89 (1996), as establishing the principle 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." 902 So. 2d at 957.

[3] It is quite telling to note the state does not argue that the facts here gave rise to a reasonable or founded suspicion, instead trying to fit the issue into its "straw man" framework and thereby implicitly admitting that the stop here must be considered improper unless it is held that a stop is allowed whenever a windshield is cracked.

Thus, in the context of a cracked windshield, the state must bear "the burden of demonstrating that the crack in the windshield was a safety problem." *Id.* In the present case, the state made no effort to meet this burden, instead relying solely on the existence of a crack, so the motion to suppress should have been granted.

C THE STATE'S CASES DO NOT SUPPORT THE CONCLUSION IT URGES

In support of its contention that a stop is authorized whenever a cracked windshield is observed, the state cites numerous out of jurisdiction cases. None of them stand for that proposition, however. Rather, they are all consistent with Mr. Hilton's position that an officer must have a reasonable or founded suspicion that some specific statutory provision is being violated. As will be apparent from the following discussion of the state's cases, that provision may differ from jurisdiction to jurisdiction, but regardless of whether it establishes specific lengths of cracks, or uses more subjective terms--such as Florida's prohibition on vehicles being in such unsafe condition as to endanger any person or property--the common thread running through the cases is the necessity that there be a reasonable or founded suspicion that the provision is being violated in order for a stop to be valid.

In asserting its position, the state cites to *United States v. Cashman,* 216 F.3d 582 (7th Cir. 2000); *United States v.*

Callarman, 273 F.3d 1284 (10th Cir. 2001); *United States v. Smith,* (unpublished opinion) 2000 U.S. App. LEXIS 32488; 2000 Colo. J.C.A.R. 6745 (10th Cir. Dec. 18, 2000); *United States v. Whiteside,* 22 Fed. Appx. 453, 2001 U.S. App. LEXIS 22883 (6th Cir. Oct.18, 2001); *State v. Vera,* 196 Ariz. 342, 996 P.2d 1246 (Ariz. App. Div. 2 1999); *Muse v. State,* 146 Md. App. 395, 807 A.2d 113 (2002); *State v. Pease,* 531 N.E.2d 1207 (Ind. App. 1 Dist. 1988); and *Darby v. State,* 239 Ga. App. 492, 521 S.E. 2d 438 (1999). Yet, none of these cases supports the state's theory that stops can be based solely on the existence of a cracked windshield. Moreover, each supports Mr. Hilton's position that a reasonable or founded suspicion that some specific provision is being violated must exist in order for a stop to be valid.

The decisions in *Cashman, Muse,* and *Pease* are discussed in Mr. Hilton's initial brief and need not be readdressed here.

In *Callarman*, the court found that the officer "had reasonable suspicion" that there was a violation of a Kansas law that prohibited driving with a damaged front windshield which "substantially obstructs the driver's clear view of the highway or any intersecting highway," when the stopped vehicle had a crack "about 12 inches across and 6 inches high, large enough that [the officer] could view it from behind" the vehicle. 273 F.3d at 1287.

Similarly, in *Smith*, the court found that the officer had a "'reasonable ariculable suspicion'" that there was a violation of a Wichita ordinance prohibiting driving with a cracked windshield that "obstructs the driver's vision," when the stopped vehicle's windshield had a crack "located in the middle or on the passenger side which ran vertically from the bottom to the middle of the windshield" and when "the officer thought that the car might be in violation of" the ordinance. State's Appendix, Exhibit 7.

In *Whiteside*, when a stop was made because of a cracked windshield,[4] the court characterized the issue as "whether the record supports a finding that the officers had probable cause[5]

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[4] The officers making the stop actually relied on an ordinance relating to windshield wipers. The court found that there was no basis to apply that ordinance, but recognized the existence of another ordinance making it unlawful to drive any vehicle "which is in such unsafe condition as to endanger any person." State's Appendix, Exhibit 7. It therefore analyzed the case in the context of the requirement that a vehicle not be in an unsafe condition.

[5] The court's reference to "probable cause" was qualified by the court's statement that "[p]robable cause to make a stop has been defined as 'reasonable ground for a belief, more than a mere suspicion, but less than a prima facie case.' *See United States v. Ferguson*, 8 F.3d 385, 392 (6th Cir. 1993)." State's Appendix, Exhibit 7. Despite this qualification, Mr. Hilton notes that the courts have sometimes used the term "probable cause" in discussing the standard for traffic stops. *See, e.g., Whren*, 517 U.S. at 810, 116 S.Ct. at 1772, 135 L.Ed. 2d at 95; *Gordon v. State,* 30 Fla. L. Weekly D1240 at D1241 (Fla. 2d DCA May 13, 2005); *Scott v. State*, 710 So. 2d 1378, 1379 (Fla. 5th DCA 1998). Assuming that "probable cause" is interpreted consistent with the qualifications expressed in *Whiteside*, the references to "probable cause" would essentially be the equivalent of

to stop Defendant for violating [a] Knoxville ordinance making it a misdemeanor to operate a motor vehicle in unsafe condition." State's Appendix, Exhibit 7. The court found that the officers "had reasonable grounds –- and thus probable cause –- for believing that Defendant was operating his vehicle in an unsafe condition" when photographs supported the officers' contention that the windshield was "badly cracked." *Id.*

In *Vera*, "the crack extended from the driver's side to the passenger's side of the windshield," 996 P.2d at 1247, and the court analyzed the stop in light of an Arizona statute that requires vehicles to have an "adequate windshield." *Id.* On page 22 of its brief, the state quotes a portion of the opinion in *Vera*, the crux of which is a quotation from a prior Arizona case to the effect that "officers 'often detain persons under circumstances which would not justify an arrest.'" 996 P.2d at 1247. The state does not include the citation, nor does it discuss the prior Arizona case, however, instead noting

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references to "reasonable or founded suspicion." Although not at issue in the present case, because it is clear that there was neither "reasonable or founded suspicion", nor "probable cause," whether defined as above or more broadly, to believe that a specific statutory provision was being violated, Mr. Hilton notes that there may well be a difference in the standard to be applied depending on the nature of the traffic offense involved in a particular stop. "Probable cause" in the usual sense of the term, not as qualified in *Whiteside*, might well be required for a traffic stop if the offense, such as speeding or running a red light, is one that has been completed and which does not require the gathering of additional information.

parenthetically, "citation omitted." A look to the case in question, *State v. Spreitz*, 190 Ariz. 129, 945 P.2d 1260 (Ariz. 1997), which quoted the language relied on by the state from *State v. Aguirre*, 130 Ariz. 54, 56, 633 P.2d 1047, 1049 (Ariz. App. Div. 2 1981), puts the language in its proper context and demonstrates the need for the sort of reasonable or founded suspicion that Mr. Hilton asserts is necessary to justify a stop. The decision in *Spreitz* sets forth the language at issue in the following context, 945 P.2d at 1273-1274:

> When police officers conduct an investigation, they may detain persons "under circumstances which would not justify an arrest." *State v. Aguirre*, 130 Ariz. 54, 56, 633 P.2d 1047, 1049 (App.1981). In *State v. Wiley* [144 Ariz. 525, 698 P.2d 1244 (Ariz. 1985)], this court instructed that a police officer may detain a person for investigative purposes if the officer has a "reasonable, articulable suspicion that a particular person had committed, was committing, or was about to commit a crime." 144 Ariz. 525, 530, 698 P.2d 1244, 1249 (1985), *overruled on other grounds*, 157 Ariz. 541, 760 P.2d 541 (1988).

Thus, reading *Vera* in light of the case law upon which it relied makes it clear that the Arizona courts follow the precise approach urged by Mr. Hilton, that a stop for a cracked windshield is valid only if there is a reasonable or founded suspicion that some specific statutory provision has been or is being violated.[6] Indeed, at least one court has interpreted *Vera*

[6] This fact is apparent not just from *Spreitz*, but also from *Aguirre*. There, the defendant conceded that the initial stop was valid. Indeed, it seems clear that there existed the

in exactly that manner. *See State v. Galvan*, 37 P.3d 1197, 1201 (Utah. App. 2001), characterizing the holding in *Vera* as "upholding trial court's conclusion that there was reasonable suspicion for the stop when windshield crack extended from driver's side to passenger's side and state statute required 'adequate' windshield."

In *Darby*, the defendant was stopped because of a starburst or spider web pattern crack of some one and a half to two inches in width, with certain cracks extending out further.[7] The court reviewed the propriety of the stop in light of a Georgia statute that prohibited the operation of a vehicle with "a starburst or spider webbing effect greater than three inches by three inches." 521 S.E.2d at 440. The court noted that the officer, while traveling behind the defendant, was able to observe a crack of more than a foot in length and concluded that this

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necessary reasonable or founded suspicion because the defendant was seen sliding under a truck in an area in which a burglary had been recently reported. 633 P.2d at 1049. During the detention, it was learned that a bracelet in the defendant's possession matched the description of one taken in the burglary, that the defendant was dressed similarly to the perpetrator, and that the defendant was detained in a location consistent with the direction in which the perpetrator ran. *Id.*

[7] The exact extent of the crack is not clear from the opinion. The defendant testified that it was "about two inches in width, with one linear crack which at the time of the stop was about two to three inches long and, at the time of the hearing, had increased to about six inches in length." 521 S.E.2d at 440. The officer who stopped the vehicle "testified that the starburst appeared to be between one and one-half and two inches in width, but that cracks appeared to spider web out beyond the actual starburst." *Id.*

observation gave him a "reasonable and articulable suspicion" that the crack "emanated from a starburst" that violated the statute at issue. *Id.*

Thus, analysis of each of the out of jurisdiction cases cited by the state demonstrates that each of the courts deciding those cases agree with Mr. Hilton's position that when a cracked windshield is not per se violative of a statute, a mere crack alone does not provide a basis for a stop and that such a stop is valid only when the crack is accompanied by circumstances which demonstrate a reasonable or founded suspicion that some provision is being violated. The state has therefore cited no case, other than the Second District opinion under review, which allows for stops based on nothing more than the existence of a crack.

D THE STATE'S LEGISLATIVE INTENT ARGUMENT

The state suggests that the portion of § 316.610(1), Florida Statutes, which allows police officers to stop vehicles was intended to take the place of vehicle inspections. There are several problems with this argument.

First, the provision allowing stops became law in 1971. Laws of Florida, ch. 71-135. Mandatory safety inspections of motor vehicles was not abolished until 1981, however. Laws of Florida, ch. 81-212. Clearly the intent of the 1971 legislature

had nothing to do with a set of circumstances that did not exist for another 10 years.

Second, the very language of § 316.610(1), Florida Statutes, belies the state's position. It states that stops may be made "*upon reasonable cause to believe* that a vehicle is unsafe or not equipped as required by law (emphasis added)." By requiring such reasonable cause, the statute incorporates the very position urged by Mr. Hilton.

Third, the state notes that a basic rule of statutory construction provides that the legislature does not intend to enact useless provisions. Mr. Hilton agrees, but asserts that this principle strongly supports his position. As discussed in Mr. Hilton's initial brief, and not addressed by the state in its brief, interpreting the statute in a manner that allows for stops whenever a windshield is cracked, without a requirement that there exist a reasonable or founded suspicion that some specific statute has been or is being violated, would run afoul of the Fourth Amendment, which clearly imposes such a requirement. Thus, adopting the state's interpretation of the statute would be to assume that the legislature adopted an unconstitutional, and therefore useless, provision.

Fourth, such an approach would not only violate the principle asserted by the state, but it would also violate other rules of constitutional construction.

It is of course well settled that legislative enactments are presumed valid, *Gardner v. Johnson*, 451 So. 2d 477, 479 (Fla. 1984); *Scullock v. State*, 377 So. 2d 682, 683-684 (Fla. 1979), and that all doubts must be resolved in favor of a finding of constitutionality. *Hamilton v. State*, 366 So. 2d 8, 10 (Fla. 1978); *Rollins v. State,* 354 So. 2d 61, 63 (Fla. 1998); *McKibben v. Mallory*, 293 So. 2d 48, 51 (Fla. 1974). Thus, a court has a duty to interpret a provision in a manner that renders it constitutional if there is any reasonable basis for doing so. *Falco v. State*, 407 So. 2d 203, 206 (Fla. 1981); *Aldana v. Holub*, 381 So. 2d 231, 237-238 (Fla. 1980). When a provision is subject to two reasonable interpretations, one of which is constitutional and one of which is not, a court must adopt the constitutional interpretation. *Florida State Board of Architecture v. Wasserman*, 377 So. 2d 653, 656 (Fla. 1979); *Leeman v. State*, 357 So. 2d 703, 705 (Fla. 1978); *Boynton v. State*, 64 So. 2d 536, 546 (Fla. 1953).

Because the approach urged by the state would render the statute unconstitutional, the above principles mandate that it be rejected and the one advocated by Mr. Hilton be adopted.

E THE STATE'S RELIANCE ON SCIENTIFIC STUDIES AND ARTICLES

The state includes in its appendix certain scientific studies and articles in an effort to demonstrate that cracked windshields are dangerous and to support the state's view that

they should be unlawful. These are inappropriate matters for this court to consider. If it wishes to change the law, the state can certainly present them to the legislature where they can be considered in a fair and balanced manner along with other studies and articles that might express contrary sentiments. They should not be considered here, however.

"No principle is more firmly embedded in our constitutional system of separation of powers and checks and balances" than the courts "duty to give effect to legislative enactments despite any personal opinions as to their wisdom or efficacy." *Moore v. State*, 343 So. 2d 601, 603-604 (Fla. 1977). "Where a statute does not violate the federal or state Constitution, the legislative will is supreme, and its policy is not subject to judicial review. The courts have no veto power, and do not assume to regulate state policy …." *Sebring Airport Authority v. McIntyre,* 783 So. 2d 238, 244-245 (Fla. 2001). Thus, a statutory interpretation "cannot be based on this Court's own view of the best policy." *Rollins v. Pizzarelli*, 761 So. 2d 294, 299 (Fla. 2000).

Courts "are not at liberty to decide what is wise, appropriate, or necessary in terms of legislation." *Stern v. Miller*, 348 So. 2d 303, 307 (Fla. 1977). Rather, "[t]he matter of wisdom or good policy of a legislative act is a matter for the legislature to determine," *Lee v. Bank of Georgia*, 159 Fla.

481, 488, 32 So. 2d 7, 10, 13 A.L.R.2d 1306, 1311 (1947); *see also State v. Reese,* 222 So. 2d 732, 736 (Fla. 1969) ("[T]he courts are not concerned with the wisdom or motives of the Legislature in enacting a law…."); *Rodriguez v. Jones*, 64 So. 2d 278, 280 (Fla. 1953) (quoting the above portion of *Lee*), and "this Court will not, and may not, substitute its judgment for that of the Legislature." *Hamilton*, 366 So. 2d at 10.

CONCLUSION

Based on the foregoing, Mr. Hilton respectfully submits that relief as requested in his initial should be granted.

CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing was mailed to Charles Crist, Attorney General, Concourse Center #4, 3507 Frontage Road, Ste. 200, Tampa, FL 33607 on Aug. 4, 2005.

CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENTS

I HEREBY CERTIFY that this brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

Respectfully submitted,

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