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IN THE SUPREME COURT OF FLORIDA

CASE NO.

DCA NO. 3D04-1510

LUIS A. PEREZ-GARCIA,

Petitioner,

-vs-

THE STATE OF FLORIDA.

Respondent.

ON APPLICATION FOR DISCRETIONARY REVIEW

PETITIONER=S BRIEF ON JURISDICTION

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INTRODUCTION

This is the Petitioner=s brief on jurisdiction requesting that this Court accept discretionary review based on direct and express conflict between this decision and decisions from this Court or other district courts of appeal and as a matter of great public importance.

The symbol (App) will be used to refer to portions of the attached appendix.

STATEMENT OF THE CASE AND FACTS

The Petitioner/Defendant was charged with possession of cocaine, discovered following a vehicle stop; police stopped his Dodge mini-van because one of his side brake lights was not lighted. His car had three rear brake lights (one of either side of the car and one in the middle). Two of the three lights worked fine. (App. 1 at 2). There was no testimony or argument that the inoperative brake light caused any type of safety concern. (App. 1 at 6).

The trial court granted the defense motion to suppress and the state appealed to The Third District Court of Appeal. The court reversed the suppression order and subsequently denied the Petitioner=s motion for rehearing. (App. 1, 2).

The district court=s reversal was premised on an interpretation of Florida Statute 316.610 (2003), as applied primarily in *Hilton v. State*, 901 So. 2d 155 (Fla. 2d DCA), *cert. granted*, SC05-438 (Fla. Mar. 17, 2005). Moreover, the court held that whether or not the officer effecting the stop believes the vehicle=s condition presents a safety concern is irrelevant; an appellate court can reach that decision based upon the record in the case. (App. 1 at 6-7). In this case, the record consists entirely upon the officer=s paperwork describing the vehicle stop. (App. 1 at 2).

QUESTION PRESENTED

WHETHER THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL DIRECTLY AND EXPRESSLY CONFLICTS WITH THIS COURT=S DECISION IN *DOCTOR v. STATE*, 596 SO. 2D 442 (FLA. 1992) ON THE PROPER APPLICATION OF FLA. STAT. 316.610 UNDER THESE FACTS?

SUMMARY OF THE ARGUMENT

The issue in this case is currently under review in this Court in *Hilton v. State*, 901 So. 2d 155 (Fla. 2d DCA), *cert. granted*, SC05-438 (Fla. Mar. 17, 2005) and concerns whether this Court=s decision in *Doctor v. State*, 596 So. 2d 442 (Fla. 1992) is still the law in Florida and whether *Doctor* presents the proper application of Fla. Stat. 316.610.

Like in this case, *Doctor* concerned an inoperative taillight which was only one of multiple rear lights on the defendant=s car. As such, it directly addressed the safety concerns caused by the inoperative light and the degree to which police may rely on Fla. Stat. 316.610 to justify a vehicle stop and search.

The district court below elected not to address *Doctor* and instead relied on district court decisions applying section 316.610 to stops based on cracked windshields. Those cases hold that cracked windshields constitute a safety hazard, within the reach of section 316.610. The failure to follow this Court=s decision in *Doctor* creates direct and express conflict warranting supreme court review.

ARGUMENT

THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL DIRECTLY AND EXPRESSLY CONFLICTS WITH THIS COURT=S DECISION IN *DOCTOR v. STATE*, 596 SO. 2D 442 (FLA. 1992) ON THE PROPER APPLICATION OF FLA. STAT. 316.610 UNDER THESE FACTS.

The Petitioner=s mini-van was stopped by police because one of its brake lights was inoperative. The mini-van had three brake lights B one on each side of the vehicle and one in the middle. The left-rear brake light was defective; the other two worked fine. There was no testimony or other evidence that the inoperative light posed a safety concern and the trial court never found one.

The trial court found that because the mini-van had two operative stop lights, it satisfied the requirements of Fla. Stats. 316.222 and 316.234.[1] The court then held the

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[1]

316.222. Stop lamps and turn signals

(1) Every motor vehicle, trailer, semitrailer, and pole trailer shall be equipped with two or more stop lamps meeting the requirements of s. 316.234(1).

316.2324. Signal lamps and signal devices

(1) Any vehicle may be equipped and, when required under this chapter, shall be equipped with a stop lamp on the rear of the vehicle which shall dsplay a red or amber light, visible from a distance of not

stop to be unlawful and suppressed the evidence therefrom.

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less than 300 feet to the rear in normal sunlight and which shall be actuated upon application of the service (foot) brake, and which may but need not be incorporated with one or more rear lamps. An object, material, or covering that alters the stop lamp=s visibility from 300 feet to the rear in normal sunlight may not be placed, displayed, installed, or affixed over a top lamp.

On appeal, the district court found that an inoperative taillight presents a safety hazard under Fla. Stat. 316.610.[2] The court based its finding primarily on *Hilton v. State*, 901 So. 2d 155 (Fla. 2d DCA), *cert. granted*, SC05-438 (Fla. Mar. 17, 2005) which involved a cracked windshield. Despite the fact that this Court=s decision in *Doctor v. State*, 596 So. 2d 442 (Fla. 1992) was cited in the suppression hearing, in the appellate brief, at oral argument and in the motion for rehearing/certification, the district court declined to address it. *Hilton* is currently under review in this Court (based on conflict with *Doctor*) B merits briefs have been filed and oral argument is scheduled for April 26, 2006.

In *Doctor*, this Court rejected the state=s claim that a defective taillight *ipso facto*

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[2]

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 statute.

violates section 316.610 and cautioned that 316.610 should be read in conjunction with other statutes prescribing safety requirements for vehicles. Asserting a safety hazard whenever a car=s equipment is defective opens the door to an overly inclusive basis for a vehicle stop. 596 So. 2d at 446-47.

Both *Doctor* and this case address the applicability of section 316.610 to stops for defective taillights. *Doctor* is the closest precedence to follow when posed with these facts. And *Doctor* remains the law in Florida even after the *Whren v. United States*, 517 U.S. 806 (1996) decision. *See State v. Burke*, 902 So. 2d 955 (Fla. 4th DCA 2005) (cited below).

Still, the third district elected not to address *Doctor* and instead relied on *Hilton* and other cracked-windshield cases. In *Hilton*, police stopped the defendant=s car because it had a 7-inch crack in the front windshield; whereupon, they observed a gun in plain view. Hilton moved to suppress the gun , and the marijuana discovered in a subsequent search of the car; however, the trial court found the stop lawful and denied the suppression motion. On appeal, the second district found that the cracked windshield constituted an immediate safety hazard, in accordance with section 316.610.

Moreover, the court held, because driving with a cracked windshield is itself a violation of the law (Fla. Stat. 316.2952), that alone provides grounds to stop the car Aeven though an examination of the windshield after the stop revealed that the crack did not create an unsafe condition.@ 901 So. 2d 155, 159.

A cracked windshield is markedly different from a broken taillight where the car has several taillights. And, unlike a cracked windshield, one inoperative taillight does not automatically constitute a violation of the traffic laws and does not obviate the need for a factual safety determination in order to fall within section 316.610.

As such, *Hilton* is not the proper precedent to follow; *Doctor* is. The court=s decision below directly contradicts the holding in *Doctor*. The district court was repeatedly confronted with this Court=s decision in *Doctor* and, in fact, was asked to include it in the opinion to ensure that supreme court jurisdiction would be perfected. The district court elected not to address the *Doctor* decision in its opinion and declined to certify conflict to this Court. Nevertheless, the contrary Alegal principles@ in the two cases provides a sufficient basis for this Court=s conflict review. *See Ford Motor Company v. Kikis*, 401 So. 2d 1341, 1342 (Fla. 1981).[3]/[4]

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[3] Conflict jurisdiction also lies to review the disparate holdings in this case and *State v. Burke*, 902 So. 2d 955 (Fla. 4th DCA 2005) on the question of whether *Doctor* survives the holding in *Whren*.

Compare the court below=s analysis in (App. at 7) with the holding in *Burke*, 902 So. 2d at 957:

> 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).

> We conclude that *Doctor* is still good law and that the majority in *Hilton* in inconsistent with *Doctor*.

4

As a secondary B but no less important B consideration when deciding on jurisdiction in this case is whether an appellate court is free to make factual findings not supported by the record or contained in the trial court order under review.

In this case, the district court found that a broken taillight necessarily constitutes a safety hazard B irrespective of whether the officer making the stop thought so. In this regard, the court holds that whether or not a defendant=s actions pose a safety risk is a matter that can be decided by an appellate court *de novo, but see Holiday Inns, Inc. v. Shelburne*, 576 So. 2d 322 (Fla. 4th DCA 1991) (whether the defendant=s actions lead to safety risks is a jury question), *dismissed*, 589 So. 2d 291 (Fla. 1991); *see also Ivory v. State*, 898 So. 2d 184, 185 (Fla. 5th DCA 2005) (safety determination made by the trial court and affirmed by the appellate court). Moreover, the court is making a factual determination based only upon the written report of the police officer B which never mentions safety.

Since, as argued above, the question of whether a broken taillight constitutes a safety hazard is situational and depends on the facts and circumstances of each case, the determination is properly left to the fact-finder below. The district court decision contravenes the notion of deference to the lower court to resolve factual matters. *See, e.g., Gilbert v. State*, 629 So. 2d 957, 958-59 (Fla. 3d DCA 1993) (AIt is equally well settled that an appellate court should not substitute its judgment for that of the trial court, but rather should defer to the trial court=s authority as a factfinder. Wasko v. State, 505 So.2d 1314, 1316 (Fla.1987); DeConigh v. State, 433 So.2d 501 (Fla.1983), cert. denied, 465 U.S. 1005, 104 S.Ct. 995, 79 L.Ed.2d 228 (1984).@)

CONCLUSION

For the foregoing reasons, the Petitioner submits that conflict jurisdiction does lie in this case and requests that this Court accept discretionary review jurisdiction.

Respectfully submitted,

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CERTIFICATE OF FONT SIZE

The undersigned certifies that this brief uses only the Times New Roman 14-point type size.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail to Thomas C. Mielke, Assistant Attorney General, Office of the Attorney General, Appellate Division, 444 Brickell Avenue, Suite 650, Miami, Florida 33131, this _ day of February, 2006.

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