IN THE SUPREME COURT OF FLORIDA

PEGGY ALLEN LUTTRELL ,

Petitioner,

v. Case No. SC08-1396

FLORIDA DEPARTMENT OF
HIGHWAY SAFETY AND
MOTOR VEHICLES,

Respondent.

_____/

ON DISCRETIONARY REVIEW FROM THE
FIFTH DISTRICT COURT OF APPEAL

PETITIONER' REPLY BRIEF

FLEM K. WHITED, III, ESQUIRE
FLORIDA BAR NO. 271071
630 N. Wild Olive Ave., Ste. A
Daytona Beach, FL 32118
(386) 253-7865 (telephone)
(386) 238-1421 (fax)

COUNSEL FOR PETITIONER

ARGUMENT

ISSUE ONE

The Department says the Fifth District

> "…did not reject the holdings in Gonzalez, Walls or Brannen that uncontroverted factual testimony may not be rejected unless contrary to law, improbable, untrustworthy, unreasonable or contradictory. Instead, the Court recognized another clearly established principle of law which is that the finder of fact is not required to believe testimony of any witness, even if unrebutted. City of Orlando Police Dept. v. rose, 974 So.2d 554, 555 (Fla. 5th DCA 2008). "Even though the state's witnesses are uncontradicted, a jury does not have to accept and believe them." State v. Paul, 638 So.2d 537, 539 (Fla. 5th DCA 1994), review denied, 651 So.2d 131 (Fla. 1995); Bouler v. State, 389 So.2d 1197 (Fla. 5th DCA 1980)(a jury can accept or reject all or any part of the testimony of any witness."

With all due respect to the Department, the above cases refer to jury trials and not circumstances where a trial judge or hearing officer, for that matter, are taking testimony in order to apply that testimony to controlling legal precedent in order to make a correct legal decision.

Walls v. State, 631 So.2d 381 (Fla.1994) was a death penalty case. The trial judge was faced with the decision to weigh aggravating and mitigating factors. If one outweighed the other, it was either life or death. Walls argued that the testimony of one of his witnesses was improperly rejected. This Court said "As a general rule, uncontroverted factual evidence cannot simply be rejected unless it is contrary to law, improbable,

untrustworthy, unreasonable, or contradictory." Id at 390. Unfortunately, this Court observed that rule only applied to factual testimony, not opinion testimony. This Court did note that the same rule that the Petitioner argues applies in this case also applied to the penalty phase of death penalty cases. See also Gonzales v. State, 785 So.2d 559, 565 (Fla.2001). This Court cited Brannen v. State, 94 Fla. 656, 114 So. 429 (1927) in Walls and Gonzalez.

In State v. Fernandez, 526 So.2d 192 (Fla. 3rd DCA 1988) the issue was the lawfulness of the stop. The state was arguing the stop was not pretextual but the trial court, hearing only from the officers, found their testimony "not credible." The Third District said "…he was not free to do so. A court must accept evidence which, like the material testimony of the police officers, is neither impeached, discredited, controvered, contradictory within itself, or physically impossible." They went on "This rule is plainly applicable here. Nothing justifies a factual finding contrary to the officers' testimony on the key issue in this case: the basis of the initial stop of Fernandez's car." In State v. Bowden, 538 So.2d 83 (Fla. 2d DCA 1989), the legal issue presented to the trial judge was the lawfulness of the seizure.

The hearing officer for the Department is required to make a legal ruling based on the facts presented regarding the issues contained in the implied consent statute. At the time of this seizure, one of those issues was

the lawfulness of the seizure. The hearing officer is acting in the same capacity of a trial judge in any criminal cases facing similar issues. A trial judge cannot simply disregard any testimony they please. Neither should a hearing officer. We all know a jury can accept or reject any testimony when reaching a verdict. But, the same rule does not apply to trial judges making legal rulings.

Simply stated, all the cases cited by the Department have no application to the issue presented before this Court.

ISSUE TWO

The Department also seems critical of the very law they supported some twenty years ago. The laws implementing administrative suspensions are as diverse as the number of states that have them implemented. See generally Chapter 11, Drinking/Driving Litigation, Nichols & Whited, 2nd Ed.

This state, chose to implement a system allowing for the reports filed by law enforcement officers to be considered as evidence. §322.2615(2) Whatever the officers put in their reports was automatically evidence to be considered by the hearing officer. The issues to be decided at the hearings were contained in the implied consent statutes and appellate court decisions.

§322.2615(7)(a) & (b) Whatever the hearing officer ruled on any of those issues had to be supported by competent substantial evidence.

But in this case, the Department seems to be drawing a distinction in the testimony that the law does not recognize. They refer to the Petitioner's testimony as "self-serving" three times in their Answer. (Answer Brief, pgs 8, 11 & 12) They call what she did, show up at her hearing and testify, as an "…attempt to present only a one-sided case,…". (Answer Brief, pg 8) They complain that the Department has "…no representation and does not subpoena witnesses." (Answer Brief, pg 8) The Department argues that the Petitioner's testimony is untrustworthy just based on that fact that it is her testimony. Of course, that argument was not followed by any legal ruling from any court in the United States.

Everything the Petitioner did in this case was perfectly legal. No constitutional provisions, state statutes, rules of procedure or rules of law or ethical standards were broken. The Petitioner had the right to testify and she did. Her testimony was her side of the events, just like the testimony of the law officers in Fernandez and Bowden cases above. The hearing officer had no more right to reject her testimony than the trial judges did the officers in the criminal cases.

The rule of law in Gonzalez, Walls, and other cases the Petitioner has cited is consistent with the proposition that when a witness takes the stand, raises their hand and takes an oath to tell the truth, it is presumed trustworthy, etc, until proven otherwise. Thus, the rule of law – a trial judge must accept testimonial evidence which is neither impeached, discredited, controvered, contradictory within itself, or physically impossible. Nothing in that rule of law provides for the baseless disregard of testimonial evidence.

The officer was on notice of the legal issues to be decided. He is the one that decided to present no evidence on the seizure. It was his decision to only say that he made contact with the driver. How can it be said, as the Fifth District did in this case that "…to accept the unrebutted testimony of a licensee (or any other witness) would eviscerate the statute."? Are they saying that if a citizen of this state that had a perfectly valid driver's license, the legal right to vote, be drafted in the military and fight and potentially lose their life for their country is not worthy of belief as a matter of law? Eviscerate the statute? How about eviscerate all this country stands for?

If the procedure is to be, as the Fifth District would have it, that law enforcement officers do not have come to the hearing, can write anything they want in the report and be accepted but the motorist is not to be believed

on any issue, then at that point we have no system. We might as well allow the summary suspension of the license and dispense with the formal review altogether.

There is no legal or practical reason to change the law for the Department of Highway Safety and Motor Vehicles. The Petitioner has no argument that driving is a privilege and the laws passed by the legislature are primarily for the safety of the public. But, one cannot forget that the suspension of a driver's license constitutes a depravation of a constitutionally protected property interest, thus invoking the requirements of due process. Bell v. Burson, 402 U.S. 535, 539 (1971) Further, "Even a days loss of a driver's license can inflict grave injury upon a person who depends upon an automobile for continued employment in his job." See Justice Stewart's dissent in Mackey v. Montrym, 443 U.S. 1 (1979) at pg 30.

CONCLUSION

The Circuit Court applied the correct law. The Fifth District went beyond its limited review jurisdiction when it concluded the Circuit Court reweighed the evidence. The Circuit Court did not reweigh the evidence. The only evidence on the critical issue of the stop was neither contrary to law, improbable, untrustworthy, unreasonable, or contradictory. The Circuit Court's ruling is consistent with precedent from this Court, the Second and

Third Districts. The Fifth District should be reversed and the holding of the Circuit Court be reinstated.

RESPECTFULLY SUBMITTED,

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FLEM K. WHITED, III, ESQUIRE
FLORIDA BAR NO. 271071
630 N. Wild Olive Ave., Suite A
Daytona Beach, FL 32118
(386) 253-7865 (telephone)
(386) 238-1421 (fax)

COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. Mail to Heather Rose Cramer, Esq., Assistant General Counsel, DHSMV, Lake Worth Legal Office, P. O. Box 540609 , Lake Worth, FL 33454-0609, this 10th day of March, 2009.

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COUNSEL FOR PETITIONER

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the font used in this pleading is 14-point Times New Roman.

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COUNSEL FOR PETITIONER