IN THE SUPREME COURT OF FLORIDA

SUSAN NADER,
Petitioner,

SUPREME COURT CASE No: SC09 - 1533
vs. LOWER CASE No: 2D08 - 1047

STATE OF FLORIDA, DEPARTMENT OF
HIGHWAY SAFETY AND MOTOR VEHICLES,
Respondent.
_____/

AMICUS BRIEF IN SUPPORT OF THE PETITIONER SUSAN NADER BY THE FLORIDA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

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SUMMARY OF THE ARGUMENT

Clark should be affirmed and Nader, the instant matter , overruled. The Nader opinion creates confusion in the law. Drivers charged with DUI who refuse any test should only have their licenses suspended when the police follow the proper procedure and give the appropriate warnings.

Even if this Honorable Court does not overrule Nader, the facts of Nader and Clark are materially different. In Clark, the record showed clearly that the driver was told that her license would be suspended for refusal to submit to a breath and/or urine and/or blood test when only a breath test was authorized by F.S. 316. 1932.

In the instant matter, the issue is rather different. In this matter, the record is lacking other than the submission of a refusal affidavit that lists the 3 tests in the disjunctive. The issue is what to do when the record is not clear.

The burden is upon DHSMV and they did not meet their burden in this matter. We ask this Honorable Court to overturn Nader and affirm Clark.

ARGUMENT

1. Compliance with Rule 9.370:

The Florida Association of Criminal Defense Lawyers, herein after, FACDL as amicus thanks this Honorable Court for giving us the opportunity to file this brief. Pursuant to Fla. R. App. P. 9.370, we advise the court that we file this brief in support of Petitioner, Susan Nader.

FACDL believes that the Court's resolution of this conflict will have an impact on the administrative license suspension proceedings throughout Florida.

a. Movant's interest: FACDL is a non-profit organization with a membership of over 1, 900 attorneys and 25 chapters throughout the state of Florida. FACDL's members are all practicing criminal defense attorneys who routinely handle administrative suspension hearings under F.S. 322.2615 that are part of the normal representation process in handling a Florida DUI case.

b. How FACDL Can Assist the Court: FACDL's unique body of real world experience and extraordinary depth and breadth of knowledge and training in the field of criminal law and the associated administrative suspensions places it in a position to be of assistance to the court in the disposition of this case at hand and in consideration of its impact on cases in the future. FACDL's interest

in this case is to ensure a fair and constitutional adjudication of the issues in this case, which it believes to be of exceptional importance.

2. **First, generally all about DUI administrative suspensions**:

More than 20,000 drivers are charged with DUI in Florida every year. We as a criminal justice system owe a duty to make sure the laws in this state are uniformly interpreted and that the drivers are treated fairly.

Only a small percentage of DUI drivers have readings below the legal limit so, a great majority are simple misdemeanor DUI cases that result in an administrative suspension of the driver's license at arrest, on the spot, simply on the arresting officer's paperwork.

There are two types of suspensions:

a. refusals

b. and readings over .08.

If the driver refuses, and many do (probably about 50%) , the suspension is for 12 months and, if the person gives a breath sample over .08, the suspension is for 6 months. These suspensions are authorized by F.S. 322. 2615 and Chapter 15A, Fla. Admin. Code. The instant matter concerns *only* the refusal suspensions.

If convicted much later in court, the driver has his or her license revoked (not suspended) pursuant to a completely separate set of statutes. The

issues in the instant appeal have nothing to do with conviction revocations. In this matter, we are dealing with up front administrative suspensions for refusing to give a breath, urine or blood sample to the police.

Unlike criminal court, the driver is presumed guilty at DHSMV from the moment the person is arrested. Even if the arresting officer made an illegal arrest, forgot to tell the driver the consequences of refusal or intentionally falsified the paperwork, DHSMV assumes the suspension is valid. If the driver does not seek a review of the suspension in writing within 10 days after the arrest, the suspension "sticks" and the driver must then go a period of time with no license followed by a long period of time with the possibility of a restricted license, if the driver qualifies. See F. S. 322.2615.

If the driver seeks formal review, a DHSMV hearing officer makes a final ruling and, if the hearing officer sustains the suspension, the driver has only one recourse, appeal by seeking certiorari review in the circuit court.

A very small percentage of DUI cases in Florida are **not** what one would call the run of the mill or typical DUI case. The typical case is a traffic stop or car accident (with no serious injuries to anyone) followed by roadside exercises that lead to an arrest for DUI.

The **a**typical DUI is a felony for death or serious bodily injury or a DUI arrest of a person who only consumed chemical or controlled substances.

The **typical** DUI case is simply an alcohol only case with no allegations of any chemical or controlled substance being involved. Both Nader and Clark are typical DUI cases.

Thousands of drivers every year are charged with **typical** DUI arrests and taken to police stations for processing. Simply put, the police think that they drank too much alcohol and should not have been driving. It is well known that the punishment for DUI is very serious.

Once arrested for DUI, the driver must be read the Florida Implied Consent *before* he or she can be asked to give a breath sample or a sample of his or her urine or blood. Although F.S. 316.1932 clearly states that everyone charged with DUI must be told the proper consequences of refusing to submit to a required test, one District Court disagreed with regard to what to do when the driver actually does give a breath sample even though the police never told the driver all of the consequences for refusing. In State v. Iaco, 906 So. 2d 1151 (Fla. 4th DCA 2005),the court said:

> Our earlier opinion in *Gunn* is controlling. Contrary to the trial court's conclusion that *Gunn* could be distinguished because it involved an inadvertent failure to advise of the criminal and administrative consequences of a refusal to take a breath test, *Gunn* did not indicate that the failure to advise in that case was in fact inadvertent. As we noted in *Gunn,* the administrative and criminal consequences apply only if the defendant refuses the breathalyzer test. When the defendant consents to the test, those consequences do

not apply. Thus, failing to be advised of them does not warrant suppression of the test results.

In refusal cases, the driver must be lawfully arrested, then requested to submit to a required test and if the driver refuses, the driver must be properly told the consequences of refusal. Otherwise, the 12 month refusal suspension would not be legal. It is well established law that before a driver can legally have his or her license suspended for refusal, the proper warnings must be given and they must be clear, concise and properly follow existing Florida law. This was discussed in many the cases cited by counsel for Petitioner Susan Nader in his brief.

If all of the police agencies would simply get together and have one correct implied consent form, all of this litigation could have been avoided. The legislature created F.S. 943.05 instructing all Florida police agencies to standardize all of their DUI forms by 2004. That never happened and even today, it looks as if it will never happen.

To help this Honorable Court understand what is actually happening in typical DUI cases when drivers refuse, we have attached an appendix called "Amicus Appendix" and it is labeled (AA. 1-124).

Here are the typical scenarios and of typical DUI arrests with refusal suspension: (No drugs or serious injuries are involved in any of these scenarios)

a. Driver lawfully arrested. Officer reads implied consent by simply saying that driver is arrested and officer is seeking a breath test only. Officer only suspects that driver is impaired by alcohol. Driver refuses. Officer then tells driver that he or she will lose their drivers license for a minimum of 12 months, that refusal can be used against them in court and at DHSMV and other language to explain that if they refused in the past, the suspension will be for 18 months and that they will be charged with a crime of second refusal. Officer then fills out refusal affidavit. Driver still refuses. Officer then suspends license and submits the new refusal affidavit (AA. 24) and checks only the breath box on the form. **THIS IS THE CORRECT PROCEDURE!** This would also be correct if the officer handed the driver an implied consent form that only demanded a breath test under penalty of a license suspension and did not make threats of a suspension if the person refused urine or blood when those tests are not applicable to the scenario.

b. Same as above but, in addition, officer tells the driver that he or she will have his or her license suspended for refusal to give a breath and/or urine test. This is not legally correct as F.S. 316.1932(1)(a)(1)(b) states that urine tests are only for DUI cases when the police have a reason to think the person was under the influence of chemical or controlled substances. See Whitehead v. State of Florida, DHSMV, 15 Fla. Law Weekly Supp. 431 (11th Cir 2007) and State v. Linaje, 15 Fla. Law Weekly 373 (11th Cir 2008).

c. Same as both examples above but, in addition, this time officer said that license will be suspended for refusal to submit to breath and/or urine and/or blood tests. Again, this is improper. Blood tests can be demanded under penalty of a license suspension *only* in special circumstances. This is well established law that was clearly explained in State v. Slaney,653 So. 2d 422 (Fla. 3d DCA 1995), DHSMV v. Clark, 974 So.2d 416 (4th DCA 2007), Trauth v. DHSMV, 14 Fla. L. W. Supp. 10 Fla.. 11th Cir. Ct. 2006) and a host of other cases cited by Counsel for Petitioner.

a. The last problem is the drivers who read implied consent forms that are very confusing and mention breath, urine and blood tests in all kinds of confusing language. (AA. 8, 11,15,20, 23,25,25-30).

> As a result of the Trauth/Llamas cases and the Clark opinion, some police agencies are still using defective implied consent forms and crossing out offending language or simply blocking some or all of it out. The problem cases are those where the police confuse drivers by blocking out some of the language but, not all of it. On top of all of this, there are also very poor Spanish translations of the forms where the English and the Spanish are not in agreement. (That causes all kinds of problems especially in Miami, where many drivers speak both Spanish and English). Other cases that cause confusion are those where there are boxes to check and the police hand the driver the blank form and forget to tell the driver to ignore the offending language (blood/urine) on certain parts of the form. Even after about 7 years of well publicized opinions, we attached an example where a police officer checked all of the boxes on a run of the mill case and the arrest is dated 10/15/09. (AA. 30). (Will they ever learn?)

In practice, thousands of drivers have been confused by bad legal advice and this has to stop. The lower courts have dealt with those cases on a case by case basis. The Clark opinion made sense and followed the clear language in the DUI statutes and the lower courts were following it.

Unfortunately, the Nader opinion has added even more confusion to the issues.

3. The 4th DCA in the *Clark* matter was correct:

The instant matter brings to this Honorable Court's attention the possibility that there may be a conflict between this matter and DHSMV v. Clark, 974 So.2d 416 (4th DCA 2007). We take the position that the instant matter was not correctly decided. This Honorable Court may also believe that there really is no conflict between the two cases as the facts in each are materially different.

We do agree that the instant matter and the Clark matter are all about what to do when the driver is arrested and refuses to give either a breath, urine or a blood sample.

The facts of the two cases are materially different.

In the Clark matter, the driver was specifically told that her license would be suspended for a minimum of 12 months if she refused to submit to a breath test **and** a urine test **and** a blood test. (AA. 1-5). Since the panel at the 2nd DCA in the Nader matter made reference to not knowing exactly what happened in the Clark matter, we have attached our entire petition we filed on behalf of Ms. Clark. (AA. 31-124)(Counsel for FACDL herein

represented Ms. Clark, Mr. Trauth, Mr. Whitehead, Mr.Martin and others so we have the records from those matters.) In Clark, there was sworn testimony from the arresting officer that he asked for all three tests even though there was no legal reason to ask for anything other than a breath test. (No serious injuries and no evidence of drug usage). Later, as is typical, the police officer filled out the then existing HSMV refusal affidavit. (AA.4). In Clark, the police used the exact same refusal affidavit as the officer used in the instant matter and it was in the disjunctive. That form, AA. 4, was HSMV form 78054 (rev. 3/03). The difference is that in Clark, the record verified that the officer asked for all three tests in the conjunctive and had the driver Ms. Clark also sign the implied consent form that asked for all three tests in the conjuntive. (AA. 5).

We must bring to the court's attention that the refusal affidavit in both the Clark and the instant matter was revised recently. It is now very unlikely that the Nader "problem" will repeat itself. Now, the form has three boxes to check and most police officers correctly only check the breath box on that form but, sure enough, counsel has seen examples where police officers check too many boxes. Those cases are handled on a case by case basis in the lower courts. To compare the old DHSMV refusal affidavit to the new one please see, (AA. 4 vs. AA. 24). Note that the new form was revised on

8/08 and was done so as a result of the Trauth/Llamas and Clark opinions. Remember, almost never does a driver actually see the refusal affidavit until many days after the arrest when the discovery process commences.

In this matter, we only know from the record that Ms. Nader was arrested and lost her license for 12 months for an alleged refusal. No one testified at the hearing and the applicable rules and statute did not require any such testimony. The only document in the file to how she was advised is the refusal affidavit form that lists breath, urine and blood tests in the disjunctive. (See AA. 4 for an example). There is no additional implied consent form in the record. Additionally, there is no record that the refusal affidavit was presented to the driver. Therefore, the issue in the instant matter is what to do when the record does not properly explain exactly what happened when the officer merely submitted the refusal affidavit that lists the three tests in the disjunctive.

Implied consent laws must be strictly construed. State v. Demoya, 380 So. 2d 505 (Fla. 3rd DCA 1980). Although DHSMV tries very hard to shift their burdens to the driver, this Honorable Court made it clear that all burdens are upon the Department to sustain the suspension when the driver requests formal review and disputes the suspension. Dobrin v. DHSMV,

874 So. 2d 1171 (Fla. 2004). See also, DHSMV v. Farley, 633 So. 2d 69 (Fla. 5th DCA 1994).

The Clark case was predicated upon the rulings found in what we call the "Trauth/Llamas" line of cases cited by counsel for the Petitioner. Those cases all originated in Miami. Clark was from Broward County. In Miami, almost all of the police agencies use implied consent forms. In many places in Florida they do not. Instead, they simply read the implied consent to the driver. For an example, see AA.22, the Monroe Implied Consent Card. It is a plastic card the officer would keep in his or her wallet. That card has *Miranda* on one side and implied consent on the other. That form makes it clear that the officer is ONLY to read the applicable demands.

The legislature created a scenario where DHSMV holds all of the cards. They suspend the driver and make him or her fight to get their licenses back. If the suspension is wrongfully sustained and the driver appeals by filing a certiorari petition in the circuit court, he or she still cannot stay or delay the 1, 3 or 18 month suspension pursuant to DHSMV v. Olivie, 753 So. 2d 593 (Fla. 3rd DCA 2000). This is why we must make certain licenses are not suspended illegally.

The Nader opinion shifts the burden to the driver to explain exactly what test the officer demanded under penalty of a license suspension. That is

not the law. The driver has no such burden. This Honorable Court made that clear in Dobrin, supra.

The Nader opinion is also wrongly decided because it makes it sound as if the driver was given a "choice" of what additional tests to take *after* he or she gives a breath test. That is not the issue. The issue is exactly what was told to the driver to get him or her to blow into the machine and was the driver illegally misled into believing that he or she had to submit to a breath, urine or blood test when only a breath test was authorized by the statutes.

If Nader stands, police officers will be able to play all kinds of games, mislead drivers and there will be no remedies.

Nader makes no sense in the real world of DUI practice. If Nader stands, then DHSMV can meet its burden by simply supplying an affidavit that is not a true statement of what happened.

Most importantly, if Nader stands, police will be allowed to make improper threats of a license suspension for refusal to be stuck with a needle and use that kind of improper threats to get people to blow into breath machines and supply urine samples.

For these reasons, we join the petitioner and ask this Honorable Court to overrule Nader and affirm Clark.

4. **Certified Question #1 – Does a Law Enforcement officer's request that a driver submit to a breath, blood, or urine test, under circumstances in which the breath-alcohol test is the only required test, violate the implied consent provisions of section 316.1932(1)(A)(1)(A) such that the Department may not suspend the driver's license for refusing to take any test?**

If this Honorable Court does not overturn the Nader opinion, the police will think they have *carte blanche* to say just about anything to coerce samples from drivers charged with DUI. The courts should uphold the legislative mandates that drivers be told that they must submit only to those tests required by law under penalty of a license suspension. Otherwise, thousands of drivers every year will be improperly coerced into giving samples of their urine and blood that are not statutorily required. We join the Petitioner in asking this Honorable Court to overrule Nader and affirm Clark.

5. **Certified Question #2 – May a District Court grant common law Certiorari relief from Circuit Court's opinion reviewing an administrative order when the Circuit Court applied precedent from another District Court but the reviewing District Court concludes that the precedent misinterprets clearly established statutory law?**

We agree with Petitioner Susan Nader that the Second District Court over extended it's review capacity by exercising it's Certiorari Jurisdiction in this case. It seems as if second tier review is merely at the whim of a panel.

CONCLUSION

Respectfully, the we join the Petitioner in her request that this court approve Clark, disapprove Nader and limit the certiorari jurisdiction of the District Court.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the copy hereof has been furnished to Damaris Reynolds, Esq., Assistant General Counsel, Counsel for Respondent, Department of Highway Safety and Motor Vehicles, to P.O. Box 540609, Lake Worth, Florida 33454-0609, and Eilam Isaak, Esq., Counsel for Petitioner Susan Nader, to 306 E. Tyler Street, Fl 2, Tampa, FL 33602 both by US Mail, this the ____ day of _____ 2010.

I hereby certify that this pleading was filed in New Times Roman, Font 14, in compliance with Fla. R. App. P. 9.210 and 9.100.

Respectfully submitted:

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