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.
_____/

REPLY BRIEF ON BEHALF OF THE PETITIONER

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ARGUMENT

COMES NOW, THE PETITIONER, by and through her counsel and replies to the Respondent's amended answer brief:

1. On page 26 of the answer brief, counsel for the Respondent argues that the FACDL's claims are ***baseless and scandalous***. Webster's online dictionary defines scandalous as "giving offense to moral sensibilities and injurious to reputation". Webster's online dictionary also lists disgraceful and shameful as synonyms. Initially, the undersigned's response is to question whether this argument crosses the lines of unethical conduct. Rule of Professional Conduct 4-8.4 prohibits disparaging opposing counsel. Since counsel for the FACDL is not permitted to reply to the answer brief under the Rules of Appellate Procedure, the undersigned feels compelled to address this argument on his behalf.

The descriptions used by counsel for the FACDL in his amicus brief along with his arguments are pragmatic to say the least and very real world. His descriptions and examples are accurate. To say that they are ***baseless*** evidences a lack of understanding what happens at the Bureau of Administrative Reviews on a daily basis. His arguments are soundly based in the law. To call them ***scandalous*** is nothing more than an attempt to disparage counsel for the FACDL. Mr. Catalano is entrenched in a ***highly***

disputed and heated litigation with the Respondent over an award of legal fees to him resulting from Clark and it's predecessor cases (Trauth/Llamas et al). To date, it is the understanding of the undersigned that the amount in dispute and awarded to Mr. Catalano is in excess of $100,000.00. As a result of the award of legal fees and following litigation, a reasonable person should wonder whether the arguments by Respondent's counsel are nothing more than a personal attack on Mr. Catalano. If yes, then the arguments would constitute a violation of the rules of ethics.

2. Replete throughout her answer brief, counsel for the Respondent consistently describes drivers as ***"drunk drivers"*** instead of simply identifying them as drivers. Ask this question, when has this court ever read a brief submitted by the Attorney General's office which refers to a defendant/appellant as a murderer, rapist, or child molester? This tactic is intended solely to inflame the emotions of this court rather than to further a fundamentally sound legal argument. Arguments intended to evoke emotions instead of promoting or furthering sound legal positions are improper. The Respondent improperly refers to drivers as "***drunk drivers***" on pages 12, 18, 19, 20 25, 26, and 27, counsel does this seven (7) times.

3. The Respondent consistently misstates and misrepresents the holding from the Clark case. On page 8 of the answer brief, the Respondent

argues that Clark stands for the proposition that driver may have been "***confused***". The Clark court **never** mentions the term "confusion", it states Clark was erroneously informed which **may have misled** her into believing that she would be required to submit to a more invasive test than authorized by statute. State of Florida, DHSMV v. Clark, 974 So.2d 416 (4th DCA 2007). The opinion never states that Clark ever testified that she was confused. State of Florida, DHSMV v. Clark, 974 So.2d 416 (4th DCA 2007). Not only does the DCA opinion in Clark fail to mention the term ***"confusion"***, but the Circuit Court opinion never mentioned it either!

The Respondent after misinterpreting Clark, then consistently returns to the concept of "confusion" over and over in the answer brief as an element of ***necessary*** proof. Clearly, since the Clark court never addressed "confusion", for the Respondent's counsel to consistently argue this point is a lack of candor with this court. The legal rule from Clark is simple and it stands for the proposition that law enforcement cannot ask for a test which is statutorily unauthorized. State of Florida, DHSMV v. Clark, 974 So.2d 416 (4th DCA 2007). Giving misinformation to someone which may mislead that person is not the same as confusing them. A person can be misled without being confused. These are not synonymous principles.

The Respondent is attempting to place a burden on the driver to correct the police when they make errors and give misinformation. A driver is not obligated to fix the police officer's mistakes. When the police misstate the law or the rights of a defendant, they do so at the peril of suppression of evidence. State v. Henry, 42 Supp.2d 42 (15th Cir 1990). The Respondent improperly attempts to add the element of "confusion" to the issue before this court on pages 7, 8, 13, 18, 19, 20, 22, and 25. The Respondent does this nine (9) times.

Along the same line of thinking as the Respondent's misstatement of Clark and adding the element of confusion, the Respondent also repeatedly and improperly attempts to shift the burden of proof to the Petitioner (Nader). Florida Statute 322.2615 places the burden of proof on the State of Florida in a formal review hearing. Florida Statute 322.2615 (2006). The driver is not required to prove anything. The driver can simply challenge the merits of the State's case. But consistently throughout the answer brief, the Respondent attempts to improperly shift the burden to Ms. Nader. The Respondent does this on pages 4, 5, 7, 11, 13, 18, 22, and 24. A large portion of the Respondent's answer brief is predicated upon misstating the holding from Clark, improperly shifting the burden of proof to Petitioner Nader , and utilizing inflammatory arguments.

4. On pages 4 and 13, the Respondent argues that no evidence exists that Petitioner Nader was asked to submit to urine or blood testing. Notwithstanding these statements, DDL 6, which is under oath, specifically states “I did request said person to submit to a breath, urine, or blood test”. Contrary to the Respondent’s position, the documentary evidence clearly states that the police did request the Petitioner to submit up to 3 tests. Two of which, were not statutorily authorized.

The argument that the police report states the Petitioner refused the breath test (without referencing the other tests) fails to support the Respondent’s position. The refusal affidavit states that up to 3 tests were requested. The supplemental police makes no mention of the other tests. The supplemental police report does not say which tests were requested, it only says the Petitioner refused a breath test. The failure to reference the other tests does not mean that they were not requested. It only means that the police report fails to make mention of it. If the report stated that “I only requested the defendant submit to a breath test and that is the only test she refused”, then the Respondent would be correct. However, the failure to document with specificity benefits the driver.

Numerous cases have held that conclusory statements without specifics undermines the validity of the police officer’s opinion. State of

Florida, DHSMV, v. Roberts, 938 So.2d 513 (5th DCA 2006), Panjevic v. State of Florida, 14 Fla. Law Weekly Supp. 415 (4th Circuit 2007), Steinberg v. State of Florida, DHSMV, Case No: 06-CA-0024 (13th Circuit 2008), Upahl v. State of Florida, DHSMV, Case No: 05-CA-4979 (13th Cir Appellate 2008).

Additionally, this court in Dobrin focused on the failure of the police officer to write in his report that the traffic stop was based upon a belief that the driver may be impaired. Dobrin v. State of Florida, DHSMV, 874 So.2d 1171 (Fla. 2004). That failure to properly document benefitted Dobrin. Dobrin v. State of Florida, DHSMV, 874 So.2d 1171 (Fla. 2004). Similarly, in this case, the police report fails to contradict the refusal affidavit by stating that only one (1) test was requested, not three (3). As such, the refusal affidavit and police report do not contradict one another.

5. The Respondent on page 5 discusses the Constitutionality of Florida Statute 322.2615. The Petitioner has not made such a challenge. Therefore, the Petitioner isn't certain why this argument exists in the answer brief. It appears to possibly play into the Respondent's position that the driver carries some type of burden of proof. If that is the case, then again, the Respondent is attempting to improperly shift the burden in violation of Florida Statute 322.2615.

6. On page 15, the Respondent argues that the administration of one test does not preclude the administration of another. While this may be true, there still exists limitations. The implication of the statute seems to advance the notion that the intention of the legislature was to authorize a breath, urine, or blood test "***when applicable"***. Only those tests which are statutorily authorized may be requested and administered. If factually, multiple tests may be requested, then which ever ones are statutorily authorized may be requested. Florida Statute 316.1932 (2009).

7. On page 16, the Respondent argues that a urine test would be authorized by the facts in this case. That is simply untrue and a disingenuine argument. In order to request urine, there has to be some objective basis to believe that the person has ingested a chemical or controlled substance, whether it is by an admission, the police finding a substance in the vehicle, or a DRE investigation. In fact, many police report have options for law enforcement to check boxes which indicated the existence of drugs, and police surely are not shy about making these notations when appropriate. No such evidence exists in this case. Simply exhibiting impaired behavior without evidence that it is the result of ingesting chemical or controlled substances is not enough to arrest a person for DUI by suspicion of chemical

or controlled substances thereby justifying a request for urine. The Respondent's argument is completely without merit.

8. The Respondent on page 26 argues that driving is not a right. However, a person does have a protectable interest in his or her driver's license. State of Florida, DHSMV, v. Pitts, 815 So.2d 738 (1st DCA 2002). And when the Respondent on page 11 and 12 states that if a driver does not request a formal review that an informal one is then held is incorrect. The DHSMV simple suspends a driver's license if no review is requested. Florida Statute 322.2615 places a jurisdictional burden on a driver to formally request a review within 10 days of the notice of suspension or the right to contest or challenge is forever lost. Florida Statute 322.2615 (2006).

9. On page 26, the Respondent argues that DUI laws should be liberally interpreted. This argument is contrary to the holding of Demoya. State v. Demoya, 380 So.2d 505 (3rd DCA 1980). The implied consent law is to be strictly construed. State v. Demoya, 380 So.2d 505 (3rd DCA 1980).

10. On page 28, the Respondent is incorrect when she states that the refusal affidavit is supplied by law enforcement. The refusal affidavit is a promulgated DHSMV form in accord with the Florida Administrative Procedures Act. And according to Florida Statute 322.2615, law enforcement acts as an agent of the Respondent (The DHSMV).

11. On page 31, the Respondent states that Nader and Clark conflict. This actually a misstatement. The 2nd DCA said "it is likely that our decision expressly and directly conflicts with Clark, the court did not say that it does. Rather, the court goes on to give jurisdiction by certifying questions as great public importance to make sure that this court had a guaranteed path of jurisdiction.

12. The issue presented in this case will have a very limited effect statewide, if any. The ***new refusal affidavit*** has been changed so that the situation from this case will not occur in the future. Police must now check the specific box for any test requested.

13. Finally, if the 2nd DCA were clear that it had not exceeded it's jurisdiction, then it not have issued the 2nd certified question. The fact that the court generated the question means that some question exists as to what exactly the court's jurisdiction is.

The Petitioner stands by her previous arguments and submits that the 2nd DCA exceeded it's jurisdiction by granting the Respondent's petition.

14. Based upon the foregoing arguments and cited authorities, the Petitioner requests this court to grant this petition for Writ of Certiorari and quash the decision of the second District Court.

CONCLUSION

Respectfully, the Petitioner requests this court approve Clark, disapprove Nader and limit the certiorari jurisdiction of the District Court.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery/mail/fax to: Department of Highway Safety and Motor Vehicles, Legal Department, P.O. Box 540609, Lake Worth, Florida 33454-0609, Mr. Michael Catalano, 1531 NW 13th Court, Miami, Florida 33125, this _____ day of _____, 2010.

I HEREBY CERTIFY that the font size in the Respondent's motion is New Times Roman 14 point.

_____

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