IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC-09-016

IN RE: AMENDMENTS TO THE
FLORIDA RULES OF TRAFFIC COURT

COMMENTS ON THE COMMITTEE'S PROPOSED AMENDMENTS TO TRAFFIC COURT RULES

COMES NOW the undersigned attorney, Steven D. Rubin, Esq., and hereby submits his comments to the proposed Amendments to the Florida Rules of Traffic Court, and says:

1. Rule 6.330.

The proposed amendment extends the time within which a defendant may elect to attend driver improvement school to "any time before trial." It is respectfully submitted that this proposal, if adopted, will conflict with F.S. Sec. 318.14(4) (2008) and 318.14(5) (2008) and 318.14(9) (2009) and cause the clerk to incur expenses which will not be reimbursed and witnesses to appear at a trial which may be cancelled at the discretion of the defendant who elects to attend driver improvement school "at any time prior to trial."

Pursuant to F.S. Sec. 318.14(4) (2008), within thirty (30) days after receipt of a citation, a person must either pay the penalty or elect to appear (i.e. plead not

guilty and request a hearing). By electing to appear, the person waives the civil penalty provisions of F.S. Sec. 318.18. See F.S. Sec. 318.14(5) (2008). Alternatively, and if eligible, the person may elect to attend driver improvement school “in lieu of a court appearance.” See F.S. Sec. 318.14(9) (2009). Reading Sections 318.14(4), (5), and (9) together, a person must pay the civil penalty, plead not guilty, or elect to attend driver improvement school within thirty (30) days after receiving the citation.

Under the proposed Rule change, if a person elects to appear, the clerk will notify the defendant of the trial date and subpoena witnesses for trial, thereby incurring expenses. However, “at any time before trial,” the defendant may elect to attend driver improvement school. Thus, even on the day of trial, after witnesses have been compelled to attend the trial, the defendant may elect to attend school and effectively cancel the trial. By having the right to elect school at that point, the defendant will not be subject to the waiver provisions of F.S. Sec. 318.14(5)(2008) even though he elected to appear. There is also a question of how the official or the clerk will determine whether the defendant is eligible to elect to attend driver improvement school when the election is made just a few minutes prior to the trial.

Moreover, the defendant will have the opportunity to determine whether a witness has appeared for trial before the defendant must decide whether to elect to

attend school. If a witness has not appeared, the defendant can determine whether the state can make its case before the election must be made. If the State cannot make its case, the defendant can move to dismiss the case, and if the State can make its case, the defendant can elect to attend school and cancel the trial. In essence, the defendant can control the trial docket by having the right to elect to attend driving school "at any time prior to trial."

The proposed Rule change might encourage a person who receives a citation to plead not guilty and set the case for trial with the hope of obtaining a dismissal for lack of prosecution if a witness fails to appear, knowing that a school election can be made immediately prior to the witness being sworn. This may encourage a person to delay electing school until trial and cause an increase in the number of trials that the clerk must schedule and the number of subpoenas the clerk must issue and serve for those trials. The county courts are already overburdened with trial dockets, and the approval of the proposed amendment may increase traffic trial caseloads and over burden a system that is already stretched to the limit.

In addition, some judicial circuits, including the 11th, 13th, 15th , and 17th, have adopted a procedure which requires a defendant who has pled not guilty to attend a pretrial hearing before the case will be set for trial. The purpose of the pretrial hearing is to give the defendant the opportunity to change the plea to no

contest to resolve the case without a trial. The experience has been that the vast majority of cases are in fact resolved at the pretrial hearing. This results in substantial cost savings to the clerk in witness fees and other trial related expenses, and time and labor cost savings to law enforcement officers and lay witnesses who would otherwise have to appear at a trial. It is anticipated that permitting a defendant to elect to attend driver improvement school up until the time of the trial may materially erode the effectiveness of the pretrial process.

In today's trying economic times, approval of the proposed Rule change may result in wasted judicial labor, clogging of the dockets, unnecessary witness fees and subpoena service costs, and inconvenience to the witnesses (officers and lay witnesses alike) who can ill afford to miss time from work. It is respectfully submitted that the Rule as presently written satisfactorily balances the rights of a defendant against the orderly administration of justice.

2. Rule 6.445.

The proposed amendment requires the speed measuring device and its serial number to be identified in the citation. It is respectfully submitted that this proposal, if adopted, does not adequately address the consequences if the identity of the device or its serial number is not contained in the citation, considering the applicability of other Traffic Rules and Statutes which pertain to the charging

instrument. An official applying the proposed Rule may have to determine whether the citation should be dismissed or amended, or the trial should be continued because the device or its serial number is not included in the citation.

Generally, a citation is not admissible in evidence. See F.S. Sec. 316.650(9)(2008). The Florida Department of Highway Safety and Motor Vehicles ("Department") is responsible for preparing and supplying uniform citations. See F.S. Sec. 316.650(1)(a)(2008). Section 4-A(2)(x)(6) of the Department's Uniform Traffic Citation Procedures Manual (June, 2007 edition) instructs a law enforcement officer on how to complete the citation when a speed measuring device has been used: "...the word 'aircraft', 'radar', 'visual', etc. should be placed in parentheses in the section reserved for 'other Violations or Comments pertaining to offense'". There is no statutory provision which states that the speed measuring device used to measure speed, or its serial number, is an element of a speeding violation. See e.g. F.S. Sec. 316.189(2008). Rather, the use of a speed measuring device in connection with a speeding violation is an evidentiary matter. Evidence of speed of a vehicle as determined by a speed measuring device can be admitted if the requirements of F.S. Sec. 316.1905(2008) and Section 316.1906(2008) are met.

Fla.R.Traf.Ct. 6.460(a)(2008) requires the rules of evidence to be liberally

construed by the official. Fla.R.Traf.Ct. 6.455 allows the citation to be amended at the time of the scheduled hearing, and the official can continue the trial if the amendment is permitted. Significantly, Rule 6.455 states in pertinent part: "No case shall be dismissed by reason of any informality or irregularity in the charging instrument."

By placing the proposed amendment in Fla.R.Traf.Ct. 6.445 instead of 6.455, it can reasonably be argued that if the device or its serial number (or an incorrect serial number or one which has omitted a digit or letter) is not contained in the citation, Fla.R.Traf.Ct. 6.455 and 6.460 remain unaffected by the proposal and the official may permit an amendment, and consider the lack of such information as an irregularity in the charging instrument. On the other hand, it is anticipated that defense counsel might argue that the approved Rule change, as the most recent pronouncement by this Court, is intended to affect the application of the other Traffic Rules, and the dismissal of the citation is required if the device is not identified or the serial number is missing or wrong in the body of the citation. To avoid inconsistent rulings among officials, it would be of great assistance to have direction from the Court on what the effect on the proceedings is if the citation does not contain the proposed required information.

3. Rule 6.480(a).

The proposed amendment mandates that a defendant must be granted not less than sixty (60) days to make payment of a civil penalty imposed. It is respectfully submitted that the justification for the amendment has not been adequately shown by the Committee. The Rule applies after a hearing has been held and the official is imposing a civil penalty against the defendant. The rationale for the amendment is that some officials are only allowing a few days for payment and this is not enough time for counsel to advise the client of the client's obligation to pay before payment is due. No empirical data is presented by the Committee to support this statement or why not less than sixty (60) days for payment is the appropriate amount of time which must be granted in every case.

It is submitted that if an official allows a legally insufficient amount of time to pay, the defendant's remedy is to appeal the decision for abuse of discretion or to file a motion for enlargement of time to pay pursuant to Fla.R.Traf.Ct. 6.360(a). The mandatory sixty (60) day payment period should be viewed in the context of when the penalty is imposed. Because a hearing has been scheduled, the defendant did not have to pay any penalty within thirty (30) days after the citation was received. Typically, a hearing will be set at least a month after the not guilty plea has been received by the clerk, and in judicial circuits which have adopted pretrial

hearings, the trial is set several months after the citation has been received. Thus, at the time of the hearing, the defendant has already obtained a de facto enlargement of time to pay the penalty. In addition, the hearing might not take place until many months or more than a year after the defendant receives the citation if the defendant sought and received a continuance of the hearing, or the defendant fails to appear until after the driver's license has been suspended, and then requests and obtains a hearing. At the hearing, the official should be vested with discretion to determine a reasonable time within which the penalty must be paid by taking into account the nature of the citation, the driving record, and all of the relevant facts and circumstances of the particular case.

4. Rule 6.600(b).

It is respectfully suggested that the Committee and the Court take this opportunity to correct the anomaly in subsection (b) and subsection (c) of this Rule. A defendant is granted the right to elect to attend driver improvement school after his license has been suspended by the Department (subsection (c)), but he has no right to elect to attend driver improvement school before his license has been suspended. It is unclear why the Rule grants the defendant more rights after the license has been suspended. The defendant should have the right to elect to attend driver improvement school in both circumstances.

5. Rule 6.600(c).

The proposed amendment grants the defendant the absolute right to have a hearing after the driver's license has been suspended as a result of the defendant's failure to appear or pay within thirty (30) days after the receipt of the citation, provided the defendant makes the request within twelve (12) months of the date of the commission of the offense. It is respectfully submitted that an official's discretion to grant or deny a hearing ("if made within a reasonable time") should remain, even if the request is made within twelve (12) months. The official should be given the opportunity to determine whether evidence has been lost, witnesses are no longer available to testify, or other circumstances exist which may prejudice the State at trial as a result of the delay caused by the defendant's own failure to comply with the directives of the citation, even if that delay is only twelve (12) months or less.

The proposed amendment also references F.S. Sec. 318.18(8)(a) for payment of costs. It is respectfully submitted that the correct reference should be to F.S. Sec. 318.15(2)(2008) which states what costs must be paid by the defendant to reinstate the driver's license after it has been suspended.

6. Rule 6.630(g).

The proposed amendment adds boating violations to the jurisdiction of

hearing officers. It is respectfully submitted that the Court address what amount and type of additional training is required for hearing officers who presently serve and have satisfied the 40 hour training requirement. It is respectfully suggested that only a two (2) hour boating course should be required for hearing officers to hear boating cases if they were serving as hearing officers prior to the effective date of the amendment. It is noted that the proposed change does not require 2 hours of on- water observation of boating enforcement because 2 hours of on-road observation of traffic enforcement is allowed as an alternative.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the foregoing was sent by U. S. Mail and facsimile to Kathy Jimenez-Morales, Chair, Traffic Court Rules Committee, State of Florida, Department of Highway Safety & Motor Vehicles, 2900 Apalachee Parkway, Room A-201, Tallahassee, Florida 32399-6552 and John F. Harkness, Jr., Executive Director, The Florida Bar, 651 E. Jefferson Street, Tallahassee, Florida 32399-2300 on this 30th day of March, 2009.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that pursuant to Fla.R.App.P. 9.210(a)(2), this Comment is typed in 14 point, Times New Roman font.

Respectfully submitted,

/S/_______________________________

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