IN THE SUPREME COURT OF FLORIDA

GARY BERNE,

Case No. SC10-2460
Lower Case No. 5D09-4648

Petitioner/Appellant,

v.

STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES

Respondent/Appellee.
____/

ON DISCRETIONARY REVIEW FROM THE FIFTH DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

RESPONDENT'S AMENDED JURISDICTIONAL ANSWER BRIEF

STEPHEN D. HURM
GENERAL COUNSEL

HEATHER ROSE CRAMER
Fla. Bar No.0901600
Assistant General Counsel
Department of Highway Safety
And Motor Vehicles
Post Office Box 540609
Lake Worth, Florida 33454
Telephone: 561-357-4169
heathercramer@flhsmv.gov

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STATEMENT OF THE CASE AND FACTS

In this brief, Appellee/Respondent, State of Florida, Department of Highway Safety and Motor Vehicles, will be referred to as the "Department." Appellant/Petitioner, Gary Berne, will be referred to as "Petitioner". Petitioner's Appendix attached to the Initial Brief on Jurisdiction and corresponding exhibit letter will be referred to as "App. __".

Following Petitioner's arrest for driving under the influence, Petitioner requested a formal administrative review of his license suspension pursuant §322.2615 (1)(b)(3), Florida Statutes. After an evidentiary hearing, the hearing officer determined by a preponderance of the evidence that sufficient cause existed to sustain Petitioner's suspension. The Department informed Petitioner in an Order dated October 20, 2006, that the suspension of his driving privilege was sustained for a period of six months.

Petitioner then sought review of the Department's Order by a Petition for Writ of Certiorari to the Circuit Court of the Ninth Judicial Circuit. On October 23, 2009, the Circuit Court issued its Order Granting Petition for Writ of Certiorari that reversed the Department's Order of license Suspension on the grounds that Petitioner rebutted the presumption that the Intoxilyzer on which he performed his breath test was properly approved for use in Florida. The Department filed a Motion for Rehearing that was denied by the circuit court on December 2, 2009.

The Department sought review of the Circuit Court's decision to the Fifth District Court of Appeal, which reversed the circuit court. The district court held that the circuit court applied the wrong law in concluding that Petitioner met his burden of rebutting the documentary evidence that established substantial compliance with FDLE rules for breath testing and concluding that the Intoxilyzer on which Petitioner was tested that utilized software version 8100.28 was not an approved device. Department of Highways Safety and Motor Vehicles v. Berne, __ So.3d __, 2010 WL 3927242, 35 Fla. L. Weekly D2238 (Fla. 5th DCA Oct. 8, 2008). The district court further held "the circuit court clearly indicates that absent an opinion from this court, the circuit court will continue to apply the wrong law in future cases of administrative license suspensions involving breath test administered on the Intoxilyzer 8000. Accordingly, we grant the petition and quash the order under review."

Petitioner now seeks review in this Court for which the Department is filing its Answer Brief on the issue of this Court's jurisdiction.

SUMMARY OF THE ARGUMENT

There is no basis for discretionary Jurisdiction in this case since there is no express conflict with a decision of this Court or another district court of appeal on the same question of law (Fla. R. App. P. 9.030(a)(2)(A) (iv)).

ARGUMENT

THERE IS NO BASIS FOR DISCRETIONARY JURISDICTION TO REVIEW THIS CASE BECAUSE THE DISTRICT COURT'S RULING IS NOT IN CONFLICT WITH ANY DECISION OF THE SUPREME COURT OR OTHER DISTRICT COURT OF APPEAL.

The standard for a conflict under Art V, section 3(b)(3) requires a district court decision that "on its face collides with a prior decision of the Court. . . on the same point of law so as to create an inconsistency or conflict among the precedents." Kincaid v. World Insurance Co., 157 So.2d 517, 518 (Fla. 1963). That is, the "rule of decision" must come into conflict tithe this court's rule of decision. Id. The decision below does not meet this test because it does not contradict the cases cited by the Petitioner.

Petitioner has failed to show any conflict between the Fifth District Court of Appeal's holding in Department of Highway Safety and Motor Vehicles v. Berne, __ So.3d __, 2010 WL 3927242, 35 Fla. L. Weekly D2238 (Fla. 5th DCA Oct. 8, 2008) and any decision of this Court or any other District Court of Appeal on the same question of law. (App. A) Therefore, there is no basis for this Court to exercise its discretionary jurisdiction to review Petitioner's case.

Contrary to Petitioner's contention the district court did not merely disagree with the circuit court's ruling. The district court reversed the circuit court because the circuit court applied the wrong law. In reversing based on an application of the

wrong law, the district court stated the correct standard of review "whether the circuit court afforded procedural due process and applied the correct law." Department of Highways Safety and Motor Vehicles v. Patrick, 895 So.2d So.2d 1131, 1133 (Fla. 5th DCA 2005); Department of Highways Safety and Motor Vehicles v. Perry, 751 So.2d 1277, 1279 (Fla. 5th DCA 2000); Department of Highways Safety and Motor Vehicles v. Conahan, 619 So.2d So.2d 988, 989 (Fla. 5th DCA 1993).

The district court appropriately exercised its discretion and granted certiorari relief because the circuit court's departure from a clearly established principle of law in the instant case resulted in a miscarriage of justice. *See* Ivey v. Allstate Insurance Company, 774 So.2d 679, 682 (Fla. 2000). Combs v. State, 436 So. 2d 93, 96 (Fla. 1983); Haines City Community Development v. Heggs, 658 So.2d 523 (Fla. 1995); Allstate Ins. Co. v. Kaklamanos, 843 So. 2d 885, 890 (Fla. 2003).

In Berne, the Fifth District held that

> the circuit court clearly indicates that absent an opinion from this court, the circuit court will continue to apply the wrong law in future cases of administrative license suspensions involving breath tests administered on the Intoxilyzer 8000. Accordingly, we grant the petition and quash the order under review.

Berne, 2010 WL 3927242 at 5. In footnote 1 of its opinion, the district court cites to no less than nine cases where circuit courts applied the incorrect law. *See* Department of Highway Safety and Motor Vehicles v. Falcone, 983 So.2d 755,

756 (Fla. 2d DCA 2008); Dep't of Highway Safety & Motor Vehicles v. Patrick, 895 So.2d 1131, 1133 (Fla. 5th DCA 2005); Dep't of Highway Safety & Motor Vehicles v. Alliston, 813 So.2d 141, 143-144 (Fla. 2d DCA), review denied, 835 So.2d 269 (Fla. 2002); at 143-44; Dep't of Highway Safety & Motor Vehicles v. Lazzopina, 807 So.2d 77, 77 (Fla. 5th DCA 2001); Dep't of Highway Safety & Motor Vehicles v. Neff, 804 So.2d 519, 520 (Fla. 5th DCA 2001); Dep't of Highway Safety & Motor Vehicles v. Dehart, 799 So.2d 1079, 1081 (Fla. 5th DCA 2001); Dep't of Highway Safety & Motor Vehicles v. Cochran, 798 So.2d 761, 762 (Fla. 5th DCA 2001); Dep't of Highway Safety & Motor Vehicles v. Mowry, 794 So.2d 657, 658 (Fla. 5th DCA 2001); Dep't of Highway Safety & Motor Vehicles v. Russell, 793 So.2d 1073, 1076 (Fla. 5th DCA 2001); *see also* State Farm Florida Ins. Co. v. Lorenzo, 969 So.2d 393, 398-99 (Fla. 5th DCA 2007) ("Moreover, we note the error could have a pervasive, widespread effect in other proceedings.").

The Fifth District Court makes it clear that the circuit court violated a clearly established principle of law resulting in a miscarriage of justice and noted that absent action from the district court, the circuit court would continue to apply the wrong law. While the standard of certiorari review for the district court is narrow, it also contains a degree of flexibility and discretion. Haines, 658 So.2d at 530 (Fla. 1995). Here, the district court properly exercised that discretionary power

of certiorari review to prevent an ongoing application of the incorrect law. In Department of Highway Safety and Motor Vehicles v. Alliston, 813 So.2d 141 (Fla. 2d DCA 2002), the district court recognized that one factor to consider in determining when a "miscarriage of justice" has occurred is whether the error is isolated or widespread in its application. The Second District stated

> Although we conclude that the circuit court applied the incorrect law in its review of this administrative order, this does not necessarily allow us to grant certiorari in this second-tier proceeding. The more difficult question in this case is whether the circuit court's error rises to the level that can be corrected as a "miscarriage of justice." Despite all the efforts of the supreme court and the district court the test to determine when a "miscarriage of justice" has occurred remains easier to state than to apply. In measuring the seriousness of an error to determine whether second-tier certiorari is available, one consideration is whether the error is isolated in its effect or whether it is pervasive or widespread in its application to numerous other proceedings. *See*, *e.g.,* Progressive Specialty Ins. Co. v. Biomechanical Trauma Ass'n, 785 So.2d 667 (Fla. 2d DCA 2001); Stilson v. Allstate Ins. Co., 692 So.2d 979 (Fla. 2d DCA 1997).

Alliston, 813 So.2d at 145 (Fla. 2d DCA 2002).

In Department of Highway Safety and Motor Vehicles v. Hofer, 5 So.3d 766, 772 (Fla. 2nd DCA 2009) the court also considered the repetitive nature of the error in granting certiorari. The court held

> the circuit court appellate decision in this case has precedential value and will result in the repetition of the same error in other proceedings involving suspension of driver's licenses. See Alliston, 813 So.2d 145. Because

> the circuit court's application of incorrect law established a legal principle applicable to future administrative proceedings, the circuit court's decision results in a miscarriage of justice that warrants the exercise of this court's certiorari jurisdiction.

Hofer, 5 So.3d at 772*; See also,* Department of Highway Safety and Motor Vehicles v. Anthol, 742 So.2d 813 (Fla. 2d DCA 1999)(Because the circuit court's written decision could affect many other administrative proceedings involving the suspension of drivers' licenses, we grant certiorari relief). Based on the foregoing, the Fifth District properly granted certiorari in the instant case where the circuit court's application of wrong law amounted to a miscarriage of justice. Petitioner's arguments regarding a conflict are therefore without merit and the request to accept jurisdiction must be denied. Combs, 436 So. 2d at 96 (Fla. 1983); Haines, 658 So.2d at 530(Fla. 1995); Allstate Ins. Co., 843 So. 2d at 890 (Fla. 2003).

In the instant case, the district court properly granted the Department's Petition for Writ of Certiorari because the circuit court committed a miscarriage of justice when it applied the incorrect law in holding that Intoxilyzers utilizing software version 8100.26 are not approved devices. In doing so the circuit court ignored the record evidence establishing that the Intoxilyzer was operated and maintained in accordance with FDLE rules and instead concluded, without any evidence to support such conclusion, that "the hearing officer failed to consider the

discrepancies and problems presented" although no discrepancies or problems were presented to the hearing officer and there was no evidence whatsoever that the hearing officer failed to consider what was presented by Petitioner. Berne v. Department of Highway Safety and Motor Vehicle, 17 Fla. L. Weekly Supp. 75a (Fla. 9th Cir. Ct. Oct 23, 2009).

Furthermore, the district court did not reweigh the evidence in holding that the Department met its burden of establishing the admissibility of Petitioner's breath test results through the documentary evidence which established that Petitioner's breath test was performed on an Intoxilyzer that was operated and maintained substantially according to methods approved FDLE. State v. Donaldson, 579 So. 2d 728, 729 (Fla. 1991). Section 316.1932(1)(b)(2), Florida Statutes. The district court also did not reweigh the evidence in concluding that Petitioner's attempt to overcome the presumption of impairment by presenting evidence that the Intoxilyzer 8000 with software version 8100.26 is not approved was insufficient because the software was properly evaluated in accordance with FDLE rules and did not require a separate approval. As the district court recognized, Rule 11D-8.003, titled "Approval of Breath Test Methods and Instruments" specifically provides:

> (6) the availability of new instruments, software, options or modifications does not negate the approval status of previously approved instruments, software, options or modifications.

Based on the foregoing, the district court's opinion in Berne is not in conflict with any decision of this Court or another district court of appeal as specified in Fla. R. App. P. 9.030(2)(A)(iv). The circuit court applied the incorrect law and the application of the incorrect law amounted to a miscarriage of justice because absent a ruling from the district court, the circuit court would continue to apply the wrong law in future cases of administrative license suspensions involving breath test administered on the Intoxilyzer 8000. Haines City Community Development, 658 So.2d at 530 (Fla. 1995); Alliston, 813 So.2d at 145 (Fla. 2d DCA 2002). Based on the foregoing, Petitioner has failed to show that this Court should exercise discretionary jurisdiction in this case.

CONCLUSION

For the foregoing reasons, the Department respectfully requests this Court to deny Petitioner's request to accept jurisdiction in this matter.

Respectfully submitted,

STEPHEN D. HURM
GENERAL COUNSEL

____
HEATHER ROSE CRAMER
Assistant General Counsel
Florida Bar No. 0901600
Post Office Box 540609
Lake Worth, Florida, 33454
Telephone: 561-357-4169
heathercramer@flhsmv.gov

CERTIFICATE OF SERVICE AND FONT SIZE

I HEREBY CERTIFY that a true and correct copy of the foregoing Jurisdictional Answer Brief has been furnished by United States Mail to STUART HYMAN, ESQUIRE, 1520 East Amelia Street, Orlando, Florida, 32803, this ___ day of January 2011. I hereby certify that the font size used in the Department's Jurisdictional Answer Brief is Times New Roman 14 point.

____
HEATHER ROSE CRAMER
Assistant General Counsel