IN THE SUPREME COURT OF THE STATE OF FLORIDA

GARY BERNE,

Petitioner,

vs.

STATE OF FLORIDA,
DEPARTMENT OF HIGHWAY
SAFETY AND MOTOR VEHICLES,
BUREAU OF DRIVER IMPROVEMENT,

Respondent.
_____/

5th DCA Case No.: 5D09-4648

Supreme Court Case No.

PETITIONER'S BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

On November 30, 2010, the Fifth District Court of Appeal in State of Florida, Department of Highway Safety and Motor Vehicles Bureau of Driver Improvement v. Berne, __ So.3d __, 2010 WL 3927242, 35 Fla. L. Weekly D 2238 (Fla. 5th DCA 2010) rendered a Corrected Opinion. (App. A) The Corrected Opinion Granting Certiorari quashed the Circuit Court Order which quashed the decision of an administrative hearing officer that sustained Petitioner's driver's license suspension.

Petitioner, Berne, was arrested and submitted to a breath test on an Intoxilyzer 8000 breath testing machine utilizing version 8100.26 software. After the test results revealed a breath alcohol level in excess of 0.08, Petitioner's driver's license was administratively suspended. Petitioner requested and received a Formal Review Hearing pursuant to Section 322.2615(6)(a), Florida Statutes (2005). At the conclusion of the Formal Review Hearing, the hearing officer, who was not an attorney, sustained the suspension of Petitioner's driver's license.

Petitioner then availed himself of the right to have that decision reviewed by filing a Petition for Writ of Certiorari in the Circuit Court for the Ninth Judicial Circuit in Orange County, Florida. The Circuit Court in Berne v. Department of Highway Safety and Motor Vehicles, 17 Fla. L. Weekly Supp.75a (Fla. 9th Cir. Ct. Oct. 23, 2010) quashed the decision of the non lawyer hearing officer and stated in part:

> Under Florida's "**Implied Consent Law**" only **approved** breath testing machines may be used to establish impairment and Florida Administrative Code Rule 11D-8.003 establishes the procedures for the **approval** of such machine. State v. Muldowney, 871 So.2d 911, 913 (Fla. 5th DCA 2004)

id, (emphasis added)

The Circuit Court also held:

> Whether or not the Petitioner's breath was tested on an **approved** device is at the heart of the instant case. Despite Petitioner's best efforts, the hearing officer failed to consider the discrepancies and problems presented in the Intoxilyzer **approval studies** performed in April and May 2002. **Competent substantial evidence existed** to demonstrate that these approval studies **did not** comply with the requirements of FDLE Rule 11D-8.003 and FDLE 34 as argued by Petitioner and noted by the en banc panel in the Atkins [State v. Atkins, 16 Fla. L. Weekly Supp. 251a (Fla. Orange Cty. Ct. June 30, 2008] case. Without independent scientific evidence demonstrating the reliability of the Intoxilyzer 8000 with software version 8100.26, the hearing officer should have excluded Petitioner's breath test results.

id, (emphasis added)

The Circuit Court further held:

> Absent any controlling authority on this point from the Fifth District Court of Appeal, we find that the en banc decision in Atkins to be well reasoned and highly persuasive in this specific case, where **Petitioner rebutted the presumption** that the Department complied with the applicable rules and regulations, and the Respondent failed to adequately meet their burden of demonstrating substantial compliance. By failing to do so, this Court finds a reversible error and grants the Petition for Writ of Certiorari.

id, (emphasis added)

Although not contained in the Opinion of the Fifth District Court of Appeal the Circuit Court also held:

> The Court finds that the Petitioner met his initial burden of rebutting the presumption created by the Department's **documentary evidence** that it substantially complied with the rules governing the approval of the breath testing instrument. At the hearing, both Roger Skipper and Kelly Melville testified that the machine used to test the Petitioner was an Intoxilyzer 8000 with software version 8100.26. Roger Skipper also testified that the last approval studies for the Intoxilyzer 8000 took place on April 30, 2002, (with software 8100.09), and May 29, 2002 (with software 8100.20). The reports entitled, "CMI, Inc. Intoxilyzer 8000 Instrumentation Evaluation Report," from those respective inspection dates further indicate that the approved software version was at least sixteen updates prior to the version used to test the Petitioner. From these reports it is clear that the **approval** of the Intoxilyzer 8000 in 2002, was far from a smooth process. As the en banc panel in State v. Atkins, et al., 16 Fla. L. Weekly Supp. 251a (Fla. 9th Cir. Ct. June 20, 2008) noted in its "Order Granting Defendants Request to Produce," the head of FDLE's Alcohol Testing Program, Laura Barfield, "testified there "were issues" during the first attempt to evaluate the instruments resulting in the suspension of testing" until they could be repaired and returned to FDLE. During the second round of testing on May 29, 2002, only one of the two instruments met all of the requirements for certification in the FDLE's Form 34; the other test was cut short when it began emit smoke. Id.

id, (emphasis added)

Dissatisfied with the Opinion of the three Circuit Court Judges in Berne, id., Respondent filed a Petition for Writ of Certiorari with the Fifth District Court of Appeal. The Fifth District Court of Appeal was prompted to grant the Petition and

quash the Circuit Court's decision. Following the decision, Petitioner timely filed a Notice to Invoke the Discretionary Jurisdiction of this Court.

SUMMARY OF THE ARGUMENT

Jurisdiction of the Supreme Court in the instant case should be invoked because the Fifth District Court of Appeal decision misapplied the standard of review for second-tier certiorari review and in doing so erroneously created new appellate jurisdiction that caused express and direct conflicts with multiple decisions involving various areas of Florida law.

ARGUMENT

THE RULING OF THE FIFTH DISTRICT COURT OF APPEAL EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF THIS COURT AS TO THE STANDARD OF REVIEW FOR SECOND-TIER CERTIORARI REVIEW AND AS A RESULT DIRECTLY AND EXPRESSLY CONFLICTS WITH MULTIPLE DECISIONS INVOLVING VARIOUS AREAS OF FLORIDA LAW.

In essence the Fifth District Court of Appeal merely disagreed with the holding of the Circuit Court without supplying a proper sufficient legal basis for second-tier certiorari review in express and direct conflict with Custer Medical Center a/a/o Maximo Masis v. United Automobile Insurance Company, __ So.3d __, 2010 WL 4340809 (Fla., Nov. 4, 2010), Haines City Cmty. Dev. v. Heggs, 658 So.2d 523 (Fla. 1995), Ivey v. Allstate Insurance Company, 774 So.2d 679 (Fla. 2000) and Combs v. State, 436 So.2d 93 (Fla. 1983).

Unlike an appeal, common law certiorari is an entirely discretionary exercise of jurisdiction by the Court and is not taken as a matter of right. See G-W Dev.

Corp. v. Village of North Palm Beach Zoning Bd. of Adjustment, 317 So.2d 828, 830 (Fla. 4th DCA 1975). A common law certiorari proceeding is considered original in the sense that the subject matter of the action or proceeding before the Court is not to be reinvestigated, tried and determined upon the merits generally as upon appeal at law or writ of error. See Haines, 658 So.2d at 525-26 (quoting Basnet v. City of Jacksonville, 18 Fla. 523, 527 (1882)). A Circuit Court Appellate decision made according to the forms of law and the rules prescribed for rendering it, although it may be erroneous in its conclusion as to what the law is as applied to the facts, is not a departure from the essential requirements of law remediable by certiorari. Ivey v. Allstate Insurance Company, 774 So.2d at 682. The policy behind prohibiting certiorari to function as a second appeal is that the Circuit Court possesses final appellate jurisdiction in cases originating in administrative proceedings. Custer Medical Center a/a/o Maximo Masis v. United Automobile Insurance Company, __ So.3d __ 2010 WL 4340809 (Fla. Nov. 4, 2010). As this Court noted in Custer Medical Center, id. citing Haines,:

> ...if the role of certiorari were expanded to review the correctness of the Circuit Court's decision, it would amount to a second appeal that usurps the final appellate jurisdiction of the Circuit Court in contravention of the Florida Constitution. See Id. at 526 n. 4. This would deprive litigants of final judgments obtained in the Circuit Court and ignore "societal interests in ending litigation within a reasonable length of time and eliminating the amount of judicial labors involved in multiple appeals". Id.

By expanding its scope of review, the Fifth District Court of Appeal below:

> Created a new category of appellate review never before recognized under Florida law and in express and direct conflict with authority to the contrary. District Courts have never been allowed to review decisions, under the guise of certiorari jurisdiction, simply because they are dissatisfied with the result of a decision of the Circuit Court sitting in its appellate capacity. Certiorari relief should not be afforded so differently in our various appellate courts.

Ivey, 774 So.2d at 683.

District Courts should consider the nature of the error and grant a Petition for Writ of Certiorari "only when there has been a violation of a clearly established principle of law resulting in a miscarriage of justice". Combs, 436 So.2d at 96 (emphasis supplied). This Court has definitively stated that certiorari cannot be used to grant a second appeal to correct the existence of mere legal error. See e.g., Ivey, 774 So.2d at 682-83. Any error by the Circuit Court, if any, did not violate the essential requirements of law and could not be the subject of second-tier certiorari review.

In quashing the decision of the Circuit Court below, the Fifth District Court of Appeal usurped the appellate authority of the Circuit Court. It ignored the underpinning of the Circuit Court ruling, that Florida's Implied Consent law under Section 316.1932, Florida Statutes (2005) imposed a primary statutory requirement that the Intoxilyzer 8000 machine itself be approved by FDLE if it is to be used as

an "approved" breath testing device. The Circuit Court, consistent with its required role for certiorari review, decided there was competent substantial evidence in the record to find that the Intoxilyzer 8000 machine itself and with 8100.26 software was not approved. The Circuit Court noted that despite Petitioner's best efforts, the hearing officer failed to consider the discrepancies and problems presented in the Intoxilyzer approval studies performed in April and May of 2002. The Circuit Court held that competent substantial evidence existed to demonstrate that the approval studies did not comply with the approval requirements of FDLE Rule 11D-8.003 and FDLE Form 34 as argued by Petitioner and noted by an en banc County Court panel decision in State v. Atkins, 16 Fla. L. Weekly Supp. 251a (Fla. Cty. Ct. June 20, 2008).

The Fifth District Court of Appeal ignored, that the Circuit Court held, that Petitioner had met his initial burden of rebutting the presumption created by the Department's documentary evidence that it substantially complied with the rules governing the "approval" of the breath testing instrument. The Fifth District Court of Appeal ignored that the Circuit Court noted that Roger Skipper testified that the last approval studies for the Intoxilyzer 8000 took place on April 30, 2002 (with software 8100.09) and May 29, 2002 (with software 8100.10). The Fifth District ignored that the Circuit Court found that the Intoxilyzer 8000 machine itself could not pass the testing to the point where the FDLE approval testing had to be suspended and the tests had to be cut short because the tested machines malfunctioned including emitting smoke.

Ignoring the underpinning of the Circuit Court's ruling that the Intoxilyzer 8000 itself with 8100.09 and 8100.10 software had not been initially properly approved by FDLE, the District Court of Appeal in express and direct conflict with State v. Polak, 598 So.2d 150 (Fla. 1st DCA 2004), held the Circuit Court applied the wrong law when the Circuit Court found that the new 8100.26 software had to be approved and not just evaluated for approval. It disregarded its own decision in Dorian v. Davis, 874 So.2d 661, 663-664 (Fla. 5th DCA 2004) holding that in second-tier certiorari review the District Appellate Court is "out of the business of determining whether or not competent substantial evidence exists to support an administrative decision".

The Fifth District improperly reweighed whether there existed competent substantial evidence. It disregarded that at the time of the approval studies on April 30, 2002 and May 29, 2002 software version 8100.26 was not even in existence until 2006 and was sixteen versions removed from the 8100.09 and 8100.10 software that failed the approval testing on those dates. It ignored Rule 11D-8.003(5) F.A.C. which required FDLE to conduct evaluations for "approval" of **new** "instrumentation" under subsection (2). It also ignored that approved "Instrumentation" is defined in Rule 11D-8.003(2) F.A.C. as an Intoxilyzer 8000 that has been approved actually using software evaluated by FDLE. The Circuit Court held the "instrumentation", i.e. an Intoxilyzer 8000 including one using evaluated software version 8100.26 had never actually been approved by FDLE.

The Fifth District also ignored that its interpretation of FDLE Rule 11D-8.003 to require only an evaluation as opposed to an approval of 8100.26 software would render FDLE Rule 11D-8.003 to be an invalid exercise of delegative legislative authority pursuant to Section 120.52(8), Florida Statutes (2005). The enabling statute for FDLE, Section 316.1932(1)(a)2.g., Florida Statutes (2006), specifically restricted FDLE's authority and powers to only:

> Have authority to **approve** or **disapprove** breath test instruments and **accompanying paraphernalia** for use pursuant to driving and boating under the influence provisions and related provisions located in this Chapter and Chapters 322 and 327.

(emphasis added)

Since FDLE had no specific statutory authority to enact a regulation or a rule, i.e. 11D-8.003 that did anything less than "approve" or "disapprove" breath test instruments and paraphernalia, the Fifth District's decision expressly and directly conflicted with Gaudett v. Florida Board of Professional Engineers, 900 So.2d 574, 578, 581 (Fla. 4th DCA 2004) and Smith v. Florida Department of Corrections, 920 So.2d 638 (Fla. 1st DCA 2005) with regard to the validity of rules that are enacted by administrative agencies and exceed proper enabling statutory authority.

The Fifth District's reweighing that the documents submitted into the record by Respondent were sufficient to meet its burden despite what the Circuit Court found was Petitioner's substantial competent evidence to the contrary also expressly and directly conflicted with Department of Highway Safety and Motor Vehicles v. Wejebe, 954 So.2d 1245 (Fla. 3d DCA 2007) (Circuit Court applied correct law where driver submitted proof Intoxilyzer machine was not in compliance with the appropriate regulations). None of the documents introduced by Respondent at the Formal Review Hearing and relied upon by the Fifth District so much as even mentioned that the Intoxilyzer 8000 machine was an approved machine.

CONCLUSION

The Fifth District Court of Appeal's decision misapplied the standard of review for second-tier certiorari review and in doing so erroneously created new

appellate jurisdiction that expressly and directly conflicts with multiple decisions involving various areas of Florida law.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Heather Rose Cramer, Assistant General Counsel, Post Office Box 540609, Lake Worth, Florida 33454-0609 by mail this ____ day of December 2010.

_____

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this foregoing brief complies with the font standards required by Fla.R.App.Pr. 9.100(l).

_____

STUART I. HYMAN, ESQUIRE

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