IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC10-2460
FIFTH DCA CASE NO.: 5D09-4648

GARY BERNE,

Petitioner,

vs.

FLORIDA DEPARTMENT OF HIGHWAY SAFETY & MOTOR VEHICLES,

Respondent.
_____/

PETITIONER'S REPLY BRIEF ON THE MERITS
On Discretionary Review from the Fifth District Court of Appeal

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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.

A. THE FIFTH DISTRICT DID NOT HAVE SECOND TIER CERTIORARI JURISDICTION TO ENTER ITS DECISION IN THIS MATTER.

The Fifth District Court of Appeal improperly exercised second tier certiorari review and placed itself in express and direct conflict with the decisions of this Court and other District Courts of Appeal around the State in Custer Medical Center a/a/o Maximo Masis v. United Automobile Insurance Company, __ So.3d __ 210 WL 4340809 (Fla., Nov. 4, 2010), Haines City Community Development v. Heggs, 658 So.2d 523 (Fla. 1995), Ivey v. Allstate Insurance Company, 774 So.2d 679 (Fla. 2000), Allstate Insurance Company v. Kaklamanos, 843 So.2d 885 (Fla. 2003), Combs v. State, 436 So.2d 93 (Fla. 1983), Department of Highway Safety and Motor Vehicles v. Edenfield, 58 So.3d 904 (Fla. 1st DCA 2011) and Department of Highway Safety and Motor Vehicles v. Wejebe, 954 So.2d 1245 (Fla. 3d DCA 2007).

While the Fifth District cited different district court cases where the Circuit Courts allegedly applied the incorrect law, a review of these cases establishes that the issues presented in those cases were completely distinguishable and different

than the approval issue involved in the instant proceeding. Department of Highway Safety and Motor Vehicles v. Falcone, 983 So.2d 755, 756 (Fla. 2d DCA 2008) involved only the issue as to whether the Department of Highway Safety and Motor Vehicles could use a breath test result affidavit, agency inspection and department inspection form as evidence to shift the burden of proof to the driver that the breath testing machine was not properly maintained. The aforesaid decision never addressed the legal issue decided by the Circuit Court below as to whether the breath testing machine was properly approved pursuant to Florida Statute 316.1932 (2006).

Falcone, id., actually supports the holding of the Circuit Court below where it acknowledges that even after the breath test result affidavit, department inspection and agency inspection are submitted into the record by the Department, the driver is allowed to prove that the Intoxilyzer machine was not in compliance with the applicable rules and once the driver does so the Department must prove that there was substantial compliance. Consistent with this legal concept, the Circuit Court below, expressly stated that 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. The Circuit Court also found "competent substantial evidence existed to demonstrate that these approval studies did not comply with the requirements of

FDLE Rule 11D-8.003 and FDLE Form 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 20, 2008)] case".

The remaining cases cited by the Fifth District Court of Appeal, Department of Highway Safety and Motor Vehicles v. Patrick, 895 So.2d 1131 (Fla. 5th DCA 2005), Department of Highway Safety and Motor Vehicles v. Alliston, 813 So.2d 141 (Fla. 2d DCA) rev. denied 835 So.2d 269 (Fla. 2002), Department of Highway Safety and Motor Vehicles v. Lazzopina, 807 So.2d 77 (Fla. 5th DCA 2009), Department of Highway Safety and Motor Vehicles v. Neff, 804 So.2d 519 (Fla. 5th DCA 2001), Department of Highway Safety and Motor Vehicles v. DeHart, 799 So.2d 1079 (Fla. 5th DCA 2001), Department of Highway Safety and Motor Vehicles v. Cochran, 798 So.2d 761 (Fla. 5th DCA 2001), Department of Highway Safety and Motor Vehicles v. Mowry, 794 So.2d 657 (Fla. 5th DCA 2001), Department of Highway Safety and Motor Vehicles v. Russell, 793 So.2d 1073 (Fla. 5th DCA 2001) also did not involve the approval issue decided by the Circuit Court below and were not precedent on that issue.

The Circuit Court below correctly noted that there was no controlling precedents that it was bound by. Without controlling precedent at the time of its decision, the Circuit Court could not have violated the essential requirements of the law. In Ivey v. Allstate Insurance Company, 774 So.2d 679, 683 (Fla. 2000) this

Court without mincing words found that the Third District Court of Appeal "merely disagreed with the Circuit Court's interpretation of the applicable law, which, as explained in Heggs, is an improper basis for common law certiorari". This Court went on to note that certiorari review did not permit the District Court to engage in a second level of appellate review of a decision issued by the Circuit Court sitting in its appellate capacity. Id. at 683. By conducting such a review, the District Court had "expressly created a new category of appellate review never before recognized under Florida law and in express and direct conflict with the authority to the contrary. Id. at 683.

This Court quoted at length from Judge Altenbernd's Opinion in Stilson v. Allstate Insurance Company, 692 So.2d 979, 982-83 (Fla. 2d DCA 1997), which stated that without controlling precedent, it could at most be a misapplication of correct law, not a violation of "a clearly established principle of law". Id. at 682 (quoting Stilson, 692 So.2d at 982-983). While Judge Altenbernd concluded that curing this problem by creating precedent was tempting, a District Court could not exercise certiorari review "simply to provide precedent where precedent is needed. Id. at 683. This Court in Ivey, id., agreed and held that the "solution" to the aforesaid problem was not a second level of appellate review when a District Court simply disagrees with the decision of a Circuit Court sitting in its appellate capacity. Id. at 683.

The Fifth District Court of Appeal below, in violation of the aforesaid precedent, improperly attempted to cure the perceived lack of precedent problem by improperly creating precedent where it thought precedent was needed. This second level of appellate review as found by this Court in Ivey, was not the solution and was not a proper exercise of certiorari review.

Brady v. State, Department of Highway Safety and Motor Vehicles, 15 Fla. L. Weekly Supp. 1145a (Fla. 9th Cir. Ct., Sept. 11, 2008) was also non supportive of Respondent's argument with respect to the issue of approval that was decided by the Circuit Court below. A close reading of the case shows that the decision in Brady was primarily concerned with the fact that Brady did not call any witnesses nor admit any records into evidence and the fact that the hearing itself was brief, lasting only six minutes. During that six minutes Brady's counsel only argued case law without witnesses or evidence.

The Brady case involved an Intoxilyzer 5000 machine and not an Intoxilyzer 8000 machine. The documents introduced by the Department in Brady pertaining to the Intoxilyzer 5000 had no relevance to the Intoxilyzer 8000 since it was a completely different machine than the Intoxilyzer 8000 used in this case.

The instant case is also distinguishable from Brady, id. due to the fact that Petitioner introduced testimony and documents that the Circuit Court below specifically found constituted substantial competent evidence to show that the

Intoxilyzer 8000 machine had never properly been approved both with and without 8100.26 software. The Circuit Court found that Petitioner had met his burden of rebutting the presumption created by the Department's more limited documentary evidence and that there was substantial competent evidence in the record to demonstrate that the approval studies did not comply with the requirements of FDLE Rule 11D-8.003 and FDLE Form 34, rendering the machine to be unapproved under §316.1932, Fla. Stat. (2006), Florida's Implied Consent law. This substantial competent evidence included approval studies showing noncompliance with FDLE Rule 11D-8.003, prior Formal Review Hearing testimony of Roger Skipper, testimony of Department Inspector Roger Skipper and Agency Inspector Kelly Melville and FDLE data and records showing the Intoxilyzer 8000 machine's complete inability to accurately measure breath volume to such an extent that it was misrepresenting scientifically unreliable results to be reliable.

The competent substantial evidence in the record also included Mr. Skipper testifying that the failed April 30, 2002 and May 29, 2002 approval studies took place with software versions 8100.09 and 8100.10 respectively which were at least sixteen software versions prior to the version 8100.26 software used to test Petitioner. The competent substantial evidence in the record established that the

8100.26 software didn't even come into existence until four years after the failed approval testing conducted by FDLE on April 30, 2002 and May 29, 2002.

Respondent claims that Department of Highway Safety and Motor Vehicles v. Falcone, 983 So.2d 755, 759 (Fla. 2d DCA 2008), State Farm Florida Insurance Company v. Lorenzo, 969 So.2d 393, 398-99 (Fla. 5th DCA 2007) and Department of Highway Safety and Motor Vehicles v. Alliston, 813 So.2d 141 (Fla. 2d DCA 2002) support the Fifth District Court of Appeal's decision that a "miscarriage of justice" had occurred because the claimed error committed by the Circuit Court would establish a legal principle that would be pervasive and widespread in its application. This unprecedented theory for second tier certiorari relief seems to have its origin in the Second District Court of Appeal case of Department of Highway Safety and Motor Vehicles v. Anthol, 742 So.2d 813 (Fla. 2d DCA 1999).

In Department of Highway Safety and Motor Vehicles v. Anthol, id. the misplaced premise for this purported exercise of certiorari jurisdiction appears to be improperly based on Haines City Community Development v. Heggs, 658 So.2d 523, 530 (Fla. 1995). Heggs, however, does not stand for and in fact doesn't even mention that the potential that an error will become pervasive or wide spread in its application to numerous other proceedings is a valid reason for a District Court exercising second tier certiorari jurisdiction. In Ivey v. Allstate Insurance

Company, 774 So.2d 679 (Fla. 2000) this Court specifically found against District Courts of Appeal expressly creating new categories of appellate review never before recognized under Florida law and that are in express and direct conflict with authority to the contrary. Id. at 683. There is no Florida Supreme Court precedence, and Respondent cites none, to support the exercise of second tier certiorari review by the Fifth District on the basis that "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".

Most recently this Court in Custer Medical Center v. United Automobile Insurance Company, 62 So.3d 1086 (Fla. 2010) relying on its precedent in Heggs, Combs, Ivey and Kaklamanos, emphasized "a District Court should exercise its discretion to grant review **only** when the lower tribunal has violated a clearly established principle of law resulting in a miscarriage of justice". Id. at 1092 (emphasis added). 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. Id. at 1093. 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. Id. at 1093.

The Circuit Court below, as did the Circuit Court in Custer, issued a well reasoned, written Opinion that relied on well established principles of law that establish pursuant to §316.1932, Fla. Stat. (2006) Petitioner was not tested on an approved Intoxilyzer 8000 machine that included approved software.

B. THE FIFTH DISTRICT DECISION EXPRESSLY CONFLICTED WITH OTHER DISTRICT COURT OF APPEAL CASES AND IMPROPERLY RESTRICTED AND NARROWED THE BREADTH AND SCOPE OF THE CIRCUIT COURT OPINION THAT THE INTOXILYZER 8000 MACHINE ITSELF AND WITH 8100.26 SOFTWARE WAS UNAPPROVED BASED ON THE FAILURE OF THE MACHINE TO COMPLY WITH §316.1932, FLA. STAT. (2010) AND FDLE RULE 11D-8.003.

The record evidence submitted by Respondent failed to establish that the breath test administered to Petitioner was ever properly approved pursuant to Florida's Implied Consent law, §316.1932, Fla. Stat. (2006). This statute imposed a primary statutory requirement that the Intoxilyzer 8000 machine be "approved" if it was to be used as a breath testing device in the State of Florida. In State v. Donaldson, 579 So.2d 728, 729 (Fla. 1991), this Court found that there must be probative evidence that the breathalyzer test was performed with a type of machine "approved" by what was then HRS and now FDLE.

The express language of the Breath Alcohol Test Result Affidavit does not establish that Petitioner's breath test was taken upon an "approved" instrument. Instead as noted in the statute, the breath test result affidavit is not admissible unless Respondent first established that Petitioner was given a breath test that was

"authorized" by §316.1932, Fla. Stat. (2006). An authorized breath test machine under this statute requires that the machine be a type that has been "approved". See State v. Donaldson, id.

Respondent attempts to rely upon the agency inspection report (Respondent's Pet. App. 4) to somehow validate the approval of the Intoxilyzer 8000 machine. Rule 11D-8.006(1), F.A.C. requires only three tests at three alcohol levels and has nothing to do with the approval of the Intoxilyzer machine under §316.1932, Fla. Stat. (2006) or FDLE Rule 11D-8.003. FDLE Rule 11D-8.003 requires fifty tests at each alcohol level pursuant to FDLE/ATP Form 34 (March 2001). Respondent's reliance on the Department Inspection also did not establish that the Intoxilyzer 8000 machine upon which Petitioner was tested was an approved breath testing device. The Department Inspection, pursuant to Rule 11D-8.004, F.A.C. requires that the machine be tested only ten times at each alcohol level as opposed to the fifty times at each alcohol level required by FDLE Rule 11D-8.003.

An evaluation of the Intoxilyzer 8000 was not made a part of the record below to determine whether the machine even passed or complied with any alleged evaluation. It was improper to argue the evaluation when it was not part of the record below. Florida Livestock D.B. v. Hygrade Food Products Corp. 141 So.2d

6, 7 (Fla. 1st DCA 1962). (It was improper for counsel on appeal to assert in their brief matters and things which were not part of the trial record.)

More importantly, when an agency's action is founded upon an erroneous interpretation of the law the appellate court may set that action aside. International Truck and Engine Corporation v. Capital Truck, Inc., 872 So.2d 372, 374 (Fla. 1st DCA 2004). Appellate Courts are free to disagree with an agency on a point of law. Id. at 374. Mr. Skipper's evaluation versus approval opinion was contradicted by Section 316.1932(1)(a)1.a., Fla. Stat. (2006), Section 316.1932(1)(a)2.g., Fla. Stat. (2004), Rule 11D-8.003(5), F.A.C., the opinion of the First District Court of Appeal in State v. Polak, 598 So.2d 150 (Fla. 1st DCA 1992) and this Court's decision in State v. Donaldson, 579 So.2d 728 (Fla. 1991).

It is telling that nowhere in the Response filed by Respondent did it address that the Fifth District Court of Appeal's interpretation of FDLE Rule 11D-8.003 to require only an evaluation as opposed to an approval of the Intoxilyzer 8000 machine with 8100.26 software would make it an invalid exercise of delegative legislative authority under §120.52(8), Fla. Stat. (2004). It is likewise telling that Respondent did not address §316.1932(1)(a)2.g., Fla. Stat. (2004) the enabling statute for FDLE. Respondent apparently does not dispute that FDLE has and had no specific statutory authority to enact a regulation or rule that did anything less than "approve" or "disapprove" breath testing instruments and "accompanying

paraphernalia". If not part of the Intoxilyzer 8000 machine, the 8100.26 software was certainly "accompanying paraphernalia" that was required to be approved. Requiring anything less than approval would make FDLE Rule 11D-8.003 an invalid exercise of delegative legislative authority and would place the Fifth District Court of Appeal decision to be in express and direct conflict with Gaudette 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).

An Intoxilyzer 8000 is required to be approved for purposes of suspending an individual's driver's license for unlawful breath alcohol level under §322.2615, Fla. Stat. (2006). See Yankey v. Department of Highway Safety and Motor Vehicles, 6 So.3d 633, 637 (Fla. 2d DCA 2009) (construing §316.1932(1)(a)2. and (b)(2) to mean that the breath test results are valid for purposes of Chapter 322 and specifically §322.2615 if performed on a breath test device "approved" by the Department). Also based on the decisions in State v. Reisner, 584 So.2d 141 (Fla. 5th DCA 1991), rev. denied 591 So.2d 184 (Fla. 1991) and State v. Hoff, 591 So.2d 648 (Fla. 5th DCA 1991) an individual who would be clearly prejudiced by a breath test result that was wrongfully put into evidence was not required to mount an administrative proceeding pursuant to Chapter 120 to challenge the breath test

results. Instead the individual could mount the challenge when the results were sought to be proffered into evidence against him.

An interpretation that FDLE could merely evaluate an Intoxilyzer 8000 machine with 8100.26 software pursuant to FDLE Rule 11D-8.003 as opposed to having to approve the machine pursuant to §316.1932(1)(a)1.a., Fla. Stat. (2006) and 316.1932(1)(a)2.g., Fla. Stat. (2004) placed the rule and statutes in direct conflict with one another. In the event of a conflict between a statute and an administrative regulation on the same subject the statute governs. Florida Department of Revenue v. A. Duda & Sons, Inc., 608 So.2d 881 (Fla. 5th DCA 1992). The statutes requiring approval therefore governed.

Respondent's reliance on Rule 11D-8.003(6), F.A.C. was also misplaced. Subsection (6) means previously approved instruments and software remain approved only when they were properly approved initially. The Circuit Court in the instant case specifically found the Intoxilyzer 8000 was not. Under Rule 11D-8.003(5), F.A.C. the Intoxilyzer 8000 with 8100.26 software was new instrumentation that must be evaluated for "approval".

A department inspection of an Intoxilyzer 8000 machine pursuant to FDLE Rule 11D-8.004 would only validate the approval of an Intoxilyzer 8000 machine if the Intoxilyzer 8000 had previously been properly approved by statute and rule. See Yankey v. Department of Highway Safety and Motor Vehicles, 6 So.3d 633,

637 (Fla. 2d DCA 2009). FDLE Rule 11D-8.003(4) presupposes that the breath test device has been previously approved by use of the language "evidentiary breath test instrument". In defining the term "evidentiary breath test instrument" Rule 11D-8.002(21), F.A.C. defines an "evidentiary breath test instrument" as a breath test instrument "approved" by the department under Rule 11D-8.003, F.A.C. For a department inspection to validate the approval of a breath testing device the device must have been previously properly approved by FDLE.

It is difficult to determine how Respondent can claim that the Intoxilyzer 8000 successfully completed the evaluation process when the approval studies of April 30, 2002 and May 29, 2002 showed, as found by the Circuit Court, that three of the four machines failed the testing and the testing had to be suspended in part because the Intoxilyzer 8000 machines were emitting smoke. Respondent claims that the lower court improperly relied on State v. Atkins, 16 Fla. L. Weekly Supp. 251a (Fla. 9th Cir. Ct., June 20, 2008). In Department of Highway Safety and Motor Vehicles v. Wejebe, 954 So.2d 1245 (Fla. 3d DCA 2007) the District Court approved the Circuit Court considering criminal trial court orders suppressing the breath test results on the same machine that was at issue in the Formal Review Hearing.

CONCLUSION

Petitioner respectfully requests that the Court quash the Fifth District's decision in this case.

Respectfully submitted,

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STUART I. HYMAN, ESQUIRE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Jason Helfant, Assistant General Counsel, Post Office Box 540609, Lake Worth, Florida 33454-0609 by mail this _____ day _____2011.

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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. 9.210(a).

_____
STUART I. HYMAN, ESQUIRE