IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. SC11-1512

GREGORY G. GEISS,

Respondent.
_____/

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

PETITIONER'S INITIAL BRIEF ON THE MERITS

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STATEMENT OF THE CASE

The Defendant was charged by information with one count of felony driving under the influence ("DUI") and one count of driving with a suspended/revoked license. (R. 40). He subsequently filed a motion to suppress the results of his blood test, taken pursuant to a warrant issued by Judge David Silverman. (R. 26-32, 58-69).

A hearing was held on this motion on March 19, 2010. (R. 1-16). The trial court entered a written order granting the motion to suppress. (R. 122-33). The State timely filed its notice of appeal. (R. 134).

On May 27, 2011, the district court issued an opinion reversing the trial court's order, finding that the blood draw was proper under the Constitution and the implied consent statute, and that the officer acted in good faith in securing the warrant to draw blood. State v. Geiss, 36 Fla. L. Wkly. D1132 (Fla. 5th DCA May 27, 2011). However, the court further held that obtaining a warrant for the blood in a misdemeanor case conflicted with the statute governing warrants. Id. at D1134-35. On July 22, 2011, the district court granted the State's motion to certify the following question of great public importance:

> DOES SECTION 933.02(2)(a), FLORIDA STATUTES, PRECLUDE LAW ENFORCEMENT OFFICERS FROM SECURING A WARRANT FOR A BLOOD DRAW IN MISDEMEANOR CASES INVOLVING AN ALLEGATION THAT A SUSPECT HAS DRIVEN WITH AN UNLAWFUL BLOOD ALCOHOL LEVEL?

State v. Geiss, 36 Fla. L. Wkly. D1575 (Fla. 5th DCA July 22, 2011).

The State timely filed its notice to invoke the discretionary jurisdiction of this Court. On September 21, 2011, this Court issued its order accepting jurisdiction pursuant to article V, section 3(b)(4) of the Florida Constitution.

STATEMENT OF FACTS

On September 5, 2009, the Defendant was stopped for the traffic offense of failing to maintain a single lane. (R. 5). He was not involved in an accident, and no one was injured or killed. (R. 6). The Defendant refused to perform requested field sobriety tests, and he refused to take a breath test. (R. 6). He was then arrested and taken to a hospital. (R. 6-7).

A search warrant was issued by Judge Silverman, authorizing medical personnel to draw the Defendant's blood for testing by law enforcement. (R. 26-32). The Defendant complied with the terms of the warrant. (R. 7). He testified that he would not have voluntarily given blood, but did so only because of the warrant. (R. 7-8).

The Defendant was ultimately charged with felony DUI, as this was his third offense in the last ten years. (R. 40). However, the affidavit for the search warrant alleged facts sufficient only for a charge of misdemeanor DUI, citing only one of the Defendant's prior DUI convictions. (R. 28-29).

The trial court entered an order granting the motion to suppress the blood test result, finding that issuing a warrant under these circumstances violated the Defendant's

constitutional right to privacy, the implied consent statute, and the search warrant statute. (R. 122-33). The State timely appealed from this order. (R. 134).

On appeal, the district court first concluded that the warrant violated neither the constitutional right to privacy nor the implied consent statute. Geiss, 36 Fla. L. Wkly. at D1133. However, the court went on to hold that the warrant was not properly issued where the officer only had probable cause to support a misdemeanor charge, as blood is not a "means to commit" the offense of DUI and accordingly not a proper subject of a warrant under section 933.02, the statute governing search warrants. Id. at 1133-34.

The district court ultimately reversed the trial court's order and remanded for further proceedings based on the court's finding that the officer who secured the Defendant's blood had relied on the search warrant in good faith. Id. at 1134.

The State timely moved for rehearing or certification, noting that this was an issue of first impression in Florida and that prosecutors had expressed concerns with the ramifications of the court's decision, as it had a great effect on the investigation of misdemeanor cases across the state. The

district court agreed, certifying a question of great public importance. Geiss, 36 Fla. L. Wkly. at D1575.

SUMMARY OF ARGUMENT

The Florida statute governing warrants, section 933.02, allows a magistrate to issue a warrant for any “property” that is used as a “means to commit” any crime. The district court erred in finding that blood is not the “means to commit” the offense of driving under the influence. Blood infused with an excessive or unlawful level of alcohol is by definition the “means to commit” this offense, in that without such alcohol-infused blood the crime could not have taken place. The certified question should be answered in the negative and the district court's decision reversed.

ARGUMENT

ALCOHOL-INFUSED BLOOD IS THE "MEANS TO COMMIT" THE OFFENSE OF DUI, AND A LAW ENFORCEMENT OFFICER CAN PROPERLY SEEK A WARRANT FOR A BLOOD DRAW IN MISDEMEANOR CASES INVOLVING AN ALLEGATION THAT A SUSPECT HAS DRIVEN WITH AN UNLAWFUL BLOOD ALCOHOL LEVEL.

The district court has asked this Court to decide whether section 933.02, the statute governing search warrants, precludes law enforcement officers from securing a warrant for a blood draw in a misdemeanor case involving an allegation that a suspect has driven with an unlawful blood alcohol level. This question should be answered in the negative, and the district court's decision reversed.

Section 933.02, Florida Statutes, establishes the grounds for issuing a search warrant, providing in relevant part that a search warrant may be issued when any "property" has been used as "a means to commit any crime." § 933.02(2)(a), Fla. Stat. These two requirements were both satisfied here.

As the lower court correctly held, a suspect's blood does constitute "property" as that term is used in the statute. Geiss, 36 Fla. L. Wkly. at D1135. While not specifically defined in the statute itself, the Legislature obviously used the term "property" in the broadest sense of the word, to indicate any tangible item that could be the subject of a

warrant. Nowhere is there any indication that this term excludes any substance that happens to be produced by the human body.

As the district court explained:

> Blood may be extracted from the body and donated and/or sold for further use. And, blood has long been routinely seized for testing as evidence in many types of criminal cases. It only makes sense that the legislature would intend the term "property" to broadly include the types of physical items that would routinely be seized in connection with a criminal investigation.

Id. Cf. Fitzpatrick v. State, 900 So. 2d 495, 514 (Fla. 2005) (noting that obtaining blood sample from suspect through a search warrant "would have been a normal investigative measure"). See also State v. Powell, 257 P.3d 1244, 1248-49 (Kan. Ct. App. 2011) (blood qualified as "property" under search warrant statute); People v. King, 663 N.Y.S.2d 610, 614 (N.Y. App. Div. 1997) ("a blood sample is not unlike other *tangible property* which can be subject to a battery of scientific tests") (emphasis added).

While recognizing that blood is "property" subject to a warrant, the district court concluded that blood could not be the "means to commit" a crime, and accordingly blood could not be drawn based on probable cause that a suspect had committed

misdemeanor DUI. Geiss, 36 Fla. Law Wkly. at D1134. This conclusion was erroneous.

Section 933.02 does not define the phrase "means to commit" a crime. When a term is undefined by statute, "[o]ne of the most fundamental tenets of statutory construction" requires that courts give a statutory term "its plain and ordinary meaning." Green v. State, 604 So. 2d 471, 473 (Fla. 1992). When necessary, the plain and ordinary meaning "can be ascertained by reference to a dictionary." Id. Here, the "means" to do something has been defined as "something that helps to attain an end; an instrument; a cause." BLACK'S LAW DICTIONARY (9th Ed. 2009).

As a logical matter, there must be a "means to commit" every crime. The offense alleged here, driving under the influence, is committed when a person drives while his normal faculties are impaired or while his blood-alcohol level is .08 or more grams of alcohol per 100 milliliters of blood. § 316.193(1), Fla. Stat. In short, this crime has two elements -- the defendant (1) drove while (2) his blood alcohol level was .08 or above.

Blood infused with an excessive or unlawful level of alcohol is, then, by definition the "means to commit" this offense, in that without such alcohol-infused blood the crime

could not have taken place.[1] As the means to commit this offense, then, the Defendant's blood was the proper subject of a warrant.

The district court's decision too narrowly interprets the statute governing search warrants, effectively eliminating such warrants in cases where an officer has probable cause to believe that an individual has been operating a motor vehicle while under the influence of drugs or alcohol and takes the laudable step of seeking the intervention of a neutral and detached magistrate to resolve this issue. The State submits that this narrow interpretation of section 933.02 is not required by the plain language of the statute and contravenes public policy encouraging officers to secure warrants. As the United States Supreme Court has stated:

> A grudging or negative attitude by reviewing courts toward warrants is inconsistent both with the desire to encourage use of the warrant process by police officers and with the recognition that once a warrant has been obtained, intrusion upon interests protected by the Fourth Amendment is less severe than otherwise may be the case.

Massachusetts v. Upton, 466 U.S. 727, 733 (1984) (citation and quotation omitted).

[1]Neither the Defendant nor the district court suggested any other possible “means” for this offense.

Section 933.02(2)(a), Florida Statutes, does *not* preclude law enforcement officers from securing a warrant for a blood draw in misdemeanor cases involving an allegation that a suspect has driven with an unlawful blood alcohol level. The certified question should be answered in the negative, and the decision of the district court reversed.

CONCLUSION

Based on the arguments and authorities presented herein, Petitioner respectfully requests this honorable Court reverse the decision of the district court and answer the certified question in the negative.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above Initial Brief on the Merits has been furnished by U.S. mail to Ernest Chang, counsel for Respondent, 6767 North Wickham Road, Suite 400, Melbourne, Florida 32940, this 17th day of October, 2011.

CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that this brief was typed using 12 point Courier New, a font that is not proportionately spaced.

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