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 REPLY BRIEF ON THE MERITS

PAMELA JO BONDI
ATTORNEY GENERAL

KRISTEN L. DAVENPORT
ASSISTANT ATTORNEY GENERAL
Florida Bar #909130
kristen.davenport@myfloridalegal.com

WESLEY HEIDT
ASSISTANT ATTORNEY GENERAL
Florida Bar #773026
444 Seabreeze Blvd.
Fifth Floor
Daytona Beach, FL 32118
(386) 238-4990

COUNSEL FOR PETITIONER

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

SUMMARY OF ARGUMENT

The district court erred in finding that blood is not the "means to commit" the offense of driving under the influence, where blood infused with an excessive or unlawful level of alcohol is the only logical "means to commit" this offense. Accordingly, the certified question should be answered in the negative and the lower court's opinion on this matter reversed.

The other issues addressed by the district court need not be considered here. To the extent they are considered, the district court's decision on these matters was correct, and those portions of its well-reasoned opinion discussing the definition of property and the implications of the implied consent statute should be affirmed.

ARGUMENT

ALCOHOL-INFUSED BLOOD IS THE "MEANS TO COMMIT" THE OFFENSE OF DUI, AND THE LOWER COURT CORRECTLY CONCLUDED THAT BLOOD CAN BE THE SUBJECT OF A WARRANT IN A DUI CASE WITHOUT VIOLATING THE IMPLIED CONSENT STATUTE.

In his Answer Brief, the Defendant asks this Court to answer the certified question in the affirmative and to address as well the broader question proposed by Judge Torpy in his dissenting opinion below – that is, whether securing a warrant for a blood draw conflicts with an individual's right to refuse such a draw under the implied consent statute. State v. Geiss, 70 So. 3d 642, 653 (Fla. 5th DCA 2011) (Torpy, J., concurring and dissenting). The State notes that this question was not actually certified to this Court, and accordingly there is no basis to address it here.

Of course, this Court's review is not limited to the certified question, and once this Court has accepted jurisdiction, it has the authority to consider any other issues decided by the court below, as long as those issues are properly raised and argued. Caufield v. Cantele, 837 So. 2d 371, 377 n. 5 (Fla. 2002). Should this Court decide to address the implied consent issue here, the district court's well-reasoned decision on this matter should be affirmed.

Extracting Blood under the Warrant Statute

In response to the State's argument in its Initial Brief, the Defendant contends that blood cannot be deemed "property" as that term is used in section 933.02, Florida Statutes, because no biological

material contained in a living body should be subject to forcible extraction. In support of this restrictive definition of property, he relies not on any Florida law, but instead on two cases from Rhode Island – cases the Rhode Island Legislature was compelled to abrogate by amending the statute those cases construed. See State v. Powell, 257 P.3d 1244, 1248 (Kan. Ct. App. 2011) (noting that statute was amended to include specific biological specimens in response to these cases).

The State submits that the Defendant has provided no reason for this Court to follow this Rhode Island case law. Excluding biological material from the definition of property is not required by any reasonable interpretation of the Florida statute, and such a holding would unduly hinder legitimate law enforcement efforts. Under the Defendant's interpretation of the statute, a warrant could not be issued to secure a blood or hair sample to match physical evidence found at the scene of a murder, or to secure a cheek swab for DNA evidence in a sexual battery investigation – biological materials for which search warrants are routinely issued.

While the Defendant describes the extraction of blood as a vast intrusion, the United States Supreme Court has disagreed with such a portrayal. In holding that blood may be extracted *even without a warrant*, the Court deemed such searches to be "minor intrusions into an individual's body." Schmerber v. California, 384 U.S. 757, 772 (1966).

The Court explained that while a blood draw implicates a person's human dignity and privacy, these interests are adequately protected by requiring probable cause before such a procedure can be undertaken. Id. at 769-70. As long as there is probable cause and a reasonable search, the Fourth Amendment is satisfied:

> [W]e are satisfied that the test chosen to measure petitioner's blood-alcohol level was a reasonable one. Extraction of blood samples for testing is a highly effective means of determining the degree to which a person is under the influence of alcohol. **Such tests are a commonplace in these days of periodic physical examination and experience with them teaches that the quantity of blood extracted is minimal, and that for most people the procedure involves virtually no risk, trauma, or pain**.

Id. at 771 (citation and footnote omitted) (emphasis added).

The district court properly concluded that blood is "property" as that term is used in section 933.02, and its decision on this issue should be affirmed. Geiss, 70 So. 3d at 649-50.

The Defendant further contends that blood cannot be the "means to commit" the offense of driving with an unlawful blood alcohol level, as that term is used in section 933.02. Notably absent from his Brief, however, is any suggestion as to what the means to commit that offense would be. The State submits that alcohol infused blood is the only logical instrumentality for such crime, and accordingly blood falls under the plain language of the warrant statute.

The Defendant contends that such a holding would allow blood to be drawn in cases involving such routine misdemeanors as disorderly intoxication or possession of marijuana. To the extent

alcohol-infused blood is the means to commit those crimes (a dubious proposition, especially regarding possession of marijuana), then a search warrant would indeed be proper upon probable cause being established for such crimes. As the State explained in its Initial Brief, warrants are a societal good, the use of which should be encouraged by the courts.

Contrary to the Defendant's position, Brevard County law enforcement officers are not lingering on the streets in search of guileless citizens they can stick with a needle. Instead, they are presenting affidavits establishing probable cause that a crime has been committed to neutral and detached magistrates, who evaluate the situation before any bodily intrusion takes place. The Defendant's blood was properly extracted under the warrant statute where his alcohol-infused blood was the means to commit the suspected offense of driving with an unlawful blood alcohol level.

The Implied Consent Statute

The Defendant also contends that the warrant was improperly issued under these circumstances based on the proposition that any other holding would render Florida's implied consent statute[1] meaningless. According to the Defendant and Amicus Curiae, blood simply cannot be the subject of a warrant in a DUI case, as the implied consent statute is the exclusive means for securing blood in these cases.

[1] §§ 316.1932, 316.1933, Fla. Stat.

The suggestion that the two statutes cannot coexist unless DUI offenses are excluded from the warrant statute requires this Court to read into the statutes limitations that are nowhere to be found.

As this Court has repeatedly recognized, statutes relating to the same subject must be construed together to harmonize the statutes and give effect to *all* statutory provisions. See, e.g., E.A.R. v. State, 4 So. 3d 614, 629 (Fla. 2009); Larimore v. State, 2 So. 3d 101, 106 (Fla. 2008).

The district court properly harmonized the relevant statutes here, concluding that the implied consent law governs warrantless searches, while searches pursuant to a warrant are (as is logical) governed by the warrant statute. Geiss, 70 So. 3d at 648. As the court recognized, "[b]y reading the implied consent statute as dealing only with the circumstances addressed by that statute – where the state seeks blood evidence in the absence of a warrant – both statutes are given 'full effect.'" Id.

Contrary to the Defendant's assertion, taking blood pursuant to a warrant is quite different from taking blood under the implied consent statute. In the former situation, a neutral and detached magistrate has evaluated the circumstances and concluded that such an intrusion is appropriate. In the latter situation, the driver has been deemed to have impliedly consented to such an intrusion by getting behind the wheel of a car and engaging in certain conduct.

This Court has recognized that this statutorily implied consent to search may be revoked by the driver, and the penalty for revoking such consent is that set forth in the statute itself – a suspended driver's license. Sambrine v. State, 386 So. 2d 546 (Fla. 1980). This right to revoke implied consent has nothing to do with the instant situation, where consent (implied or otherwise) was never an issue.

The Sambrine opinion addressed a *warrantless* blood draw and the protection provided by the implied consent statute in those situations. The facts in Sambrine had nothing to do with a situation where blood was secured under the separate warrant statute, where the individual already has the protection of a neutral and detached magistrate.

Indeed, if Sambrine is so far reaching as to preclude blood draws on suspicion of DUI in any situation that falls outside the implied consent statute, then this Court would have reached a far different result in its later decision in Robertson, which approved the admission of blood test results obtained by actual consent and of blood test results from blood withdrawn for medical purposes. Robertson v. State, 604 So. 2d 783 (Fla. 1992). See also State v. Murray, 51 So. 3d 593, 595-96 (Fla. 5th DCA) (if the defendant has expressly consented to a blood test, the test falls outside the scope of the implied consent law), rev. denied, 63 So. 3d 750 (Fla. 2011).

If the implied consent statute does not bar the admission of blood test results in these contexts, there is no reason it bars the admission of blood test results in the context of a warrant.

Nowhere in the statutes governing DUI has the Legislature indicated an intent to invalidate the long-standing judicial authority to issue a warrant under section 933.02, Florida Statutes. Had the Legislature intended to do so, it could have easily included language barring such warrants. The Court should not read such language into the statute where there is no basis to do so.

Numerous courts in other states have reached the same conclusion, finding that their implied consent laws did not preclude the issuance of search warrants in DUI cases where those laws expressed no intent to do so. See State v. Smith, 134 S.W. 3d 35, 40 (Mo. Ct. App. 2003); Brown v. State, 774 N.E.2d 1001, 1007 (Ind. Ct. App. 2002), transfer denied, 792 N.E.2d 37 (Ind. 2003); Beeman v. State, 86 S.W. 3d 613, 616 (Tex. Crim. App. 2002); Manko v. Root, 476 N.W.2d 776, 777 (Mich. Ct. App. 1991), appeal denied, 486 N.W.2d 675 (Mich. 1992); State v. Zielke, 403 N.W.2d 427, 428 (Wis. 1987).[2] Should this Court hold to the contrary, it would stand alone in the country in reaching such a conclusion.

[2]The Defendant cites several cases holding that the implied consent statute was the exclusive means to obtain blood in a DUI case, but in each of those cases the implied consent statute expressly stated that if a person refused chemical testing, no other test could be given. (Answer Brief at p. 6); Geiss, 70 So. 3d at 647. No such language appears in Florida's implied consent law.

While these cases are not controlling here, their reasoning is persuasive. Indeed, as the district court recognized, the Indiana court addressed this issue in the very same context as it is raised here, with similar statutes and similar precedent recognizing that the implied consent law gave greater rights than the Fourth Amendment. Geiss, 70 So. 3d at 647 n.3. In concluding that a warrant was properly obtained, the Indiana court determined that construing the implied consent law's *silence* on the issue of search warrants as a proscription against obtaining them would place drunken drivers in an "exalted class of criminal defendants, protected by the law from every means of obtaining the most important evidence against them.'" Brown, 774 N.E.2d at 1007 (citation omitted).

There is simply no indication that the Florida Legislature intended to give suspected drunk drivers a protection no other individual in Florida has – precluding officers from executing a reasonable search warrant based on probable cause, simply because the individual did not consent to such a search. In all other circumstances, consent is rendered irrelevant once a valid search warrant is obtained, and DUI cases should be treated no differently. Cf. Fitzpatrick v. State, 900 So. 2d 495, 514 (Fla. 2005) (even if defendant's consent to the taking of his blood was involuntary, the error was harmless because the police had probable cause for a warrant requiring a blood sample, and the blood sample would have been inevitably obtained).

The implied consent laws govern just that -- the situations where a driver has *consented* to a blood test *as a matter of law*. The State did not rely on such consent here, nor did it seek the presumptions and benefits of that statutory scheme. See Robertson, 604 So. 2d at 790 ("a person only needs the protection of the implied consent law if the testing provisions of that law actually are being invoked by the state"); Pardo v. State, 429 So. 2d 1313, 1315 (Fla. 5th DCA 1983) (implied consent statutes provide for admissibility of tests made in accordance with their provisions and for use of the statutory presumptions, but they do not "constitute a limitation on the admissibility of any competent evidence that would otherwise be admissible in any civil or criminal case in the absence of these statutes").

Just like any other defendant and any other evidence obtained by a valid warrant, the Defendant's blood test result should be admissible at trial. The district court properly construed the implied consent statute harmoniously with the warrant statute, and its reasoning on this matter should be approved.

CONCLUSION

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

Respectfully submitted,

PAMELA JO BONDI
ATTORNEY GENERAL

KRISTEN L. DAVENPORT
ASSISTANT ATTORNEY GENERAL
Fla. Bar #909130
444 Seabreeze Boulevard
Fifth Floor
Daytona Beach, FL 32118
(386) 238-4990

COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above Reply Brief on the Merits has been furnished by U.S. mail to Ernest L. Chang, counsel for Respondent, 6767 North Wickham Road, Suite 400, Melbourne, Florida 32940, and to James T. Miller, counsel for Amicus Curiae FACDL, 233 East Bay Street, Suite 920, Jacksonville, Florida 32202, this 30th day of December, 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.

Kristen L. Davenport
Assistant Attorney General