IN THE SUPREME COURT OF THE STATE OF FLORIDA

CANDIE ANDERSON,

Petitioner,

v. Case No. SC11-3

STATE OF FLORIDA,

Respondent.
_____/

ON DISCRETIONARY REVIEW FROM
THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT

PETITIONER'S REPLY BRIEF ON MERITS

JAMES S. PURDY
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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SUMMARY OF THE ARGUMENT

It is improper to raise for the first time an argument that was not raised in the trial court or on direct appeal. Notwithstanding the waiver argument, the statute providing that the offense of driving on a suspended license where such suspension was for a violation of financial responsibility is an unambiguous statement which must be given broad interpretation rather than the narrowing interpretation urged by the State. Thus, where such suspension is for financial responsibility violation, there must be evidence beyond a simple presumption, that the individual received actual notice of the suspension.

ARGUMENT

IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT THE DECISION OF THE FIFTH DISTRICT BELOW MUST BE QUASHED BECAUSE IT MATERIALLY MISINTERPRETS THE LAW WITH REGARD TO PROOF OF THE OFFENSE OF DRIVING WHILE LICENSE SUSPENDED.

In its brief on the merits, the State takes the position that the Fifth District was correct in its decision on the grounds that it "suggested" that Petitioner's suspension was not for a violation of financial responsibility since it resulted from a failure to pay court ordered restitution and therefore the rebuttable presumption that proof of mailing notice of suspension of license was applicable to Petitioner. Petitioner contends that Respondent's argument is totally improper and must be rejected by this court.

In the instant case, it is unquestioned that Petitioner's license suspension was based on her failure to pay court-ordered restitution. Petitioner contended at the trial level, and maintained on appeal, that because this suspension was based on a violation of financial responsibility, the State is required to show that Petitioner had actual notice of the suspension. The trial court rejected this argument in reliance of the Fifth District's case of ***Fields v. State***, 731 So. 2d 753 (Fla. 5th DCA 1999), wherein the Court held that the proper mailing of notice of suspension is conclusive evidence of notice. However, since ***Fields***, the statute has been

amended to require actual notice where such suspension is for failure to pay traffic citation or a violation of financial responsibility. At no time at the trial level did the state even suggest that the statutory presumption of mailing of notice applied to Petitioner. In appeal to the Fifth District, the state never argued that the statutory presumption arising from proper mailing of notice applied to Petitioner. In fact, the only mention of such suggestion occurs in the opinion of the Fifth District in a footnote wherein it stated:

> **Although not argued by the State,** we note parenthetically that the exception to the presumption **might not be applicable** here in any event. It only applies when the suspension is for nonpayment of traffic fines or "a financial responsibility violation." We think the latter form of suspension refers to suspensions under Chapter 324, Florida Statutes, which is the chapter that pertains to "Financial Responsibility." Here the suspension was for an entirely different reason - failure to pay a court-ordered obligation under a payment plan pursuant to section 322.245(5)(a).

Anderson v. State, 48 So. 3d 1015, 1019 fn6 (Fla. 5th DCA 2010) (emphasis supplied). For the state to now strenuously argue this issue is improper. Petitioner contends that by failing to raise this issue, the state has effectively waived it. In ***Krivanek v. Take Back Tampa Political Committee***, 625 So. 2d 840 (Fla. 1993), the committee sought mandamus relief in the trial court, asking that Krivanek, the Hillsborough County supervisor of elections, be ordered to count the signatures of

certain voters in its petition drive. The trial court granted the relief, and that decision was affirmed by the Second District in ***Krivanek v. Take Back Tampa Political Comm.***, 603 So. 2d 528 (Fla. 2nd DCA 1992). Upon seeking review in the Florida Supreme Court, Krivanek raised for the first time the issue of whether the committee had standing to seek such relief. This Court came to the following conclusion:

> With regard to the first issue, we find that Krivanek has waived the right to raise the issue of standing because this issue has been raised for the first time in her petition to this Court. The issue of standing should have been raised as an affirmative defense before the trial court, and Krivanek's failure to do so constitutes a waiver of that defense, precluding her from raising that issue now. *See, E.G., Cowart v. City of West Palm Beach*, 255 So. 2d 673 (Fla. 1971).

Krivanek, 625 So. 2d at 842.

Notwithstanding the waiver argument, the Fifth District's "suggestion" as to the interpretation of financial responsibility cannot be sustained. The statute itself does not offer a definition of financial responsibility. As a general rule, statutory interpretation begins with the plain meaning of the statute. ***G.T.C., Inc. v. Edgar***, 967 So. 2d 781, 785 (Fla. 2007)(*citing* ***Holly v. Auld***, 450 So. 2d 217, 219 (Fla. 1984)). As this Court has explained,

> [w]hen the language of the statute is clear and unambiguous and conveys a clear and definite meaning,

> there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning.

Holly, 450 So. 2d at 219 (*quoting* ***A.R. Douglass, Inc., v. McRainey***, 102 Fla. 1140, 137 So. 157, 159 (1931)). "If the language of a statute is clear and unambiguous, the legislative intent must be derived from the words used without involving rules of construction or speculating as to what the legislature intended." ***Kephart v. Hadi***, 932 So. 2d 1086, 1091 (Fla. 2006) (*quoting* ***Zuckerman v. Alter***, 615 So. 2d 661, 663 (Fla. 1992)). "[E]ven where a court is convinced that the legislature really meant and intended something not expressed in the phraseology of the [statute], it will not deem itself authorized to depart from the plain meaning of the language which is free from ambiguity." ***St. Petersburg Bank & Trust Company v. Hamm***, 414 So. 2d 1071, 1073 (Fla. 1982)(*quoting* ***Van Pelt v. Hilliard***, 75 Fla. 792, 78 So. 693, 694 (1918)). In the instant case, the Fifth District suggested in its footnote that the term financial responsibility violation referred to a violation of Chapter 324, Florida Statutes, which is entitled "Financial Responsibility." If the legislature intended such a limiting application, it could have and would have cited to Chapter 324. It chose not to which is a clear indication that the term "financial responsibility" had broader interpretation. Indeed, because there can by automatic suspensions for failure to pay restitution,

court costs, child support and others, it is plain that the legislature entitled a broader interpretation since these are all matters of "financial responsibility."

Turning to the merits of the case, the state posits that because the instant case involves a violation of probation wherein the standard of proof is much lower, there is no conflict with ***Brown v. State***, 764 So. 2d 741 (Fla. 4th DCA 2000) or ***Haygood v. State***, 17 So. 3d 394 (Fla. 1st DCA 1009), because those cases involve a trial wherein the standard of proof is beyond a reasonable doubt. Petitioner contains that this is simply a distinction without a difference. Petitioner's probation was revoked soley for a violation of condition 5 which alleged that she violated the law by committing the offense of driving on a suspended license. Because her license had been suspended for a violation of financial responsibility, the only way that this offense could be criminal would be upon a showing that Petitioner received actual notice of the suspension. In this regard, the state was required to present evidence beyond the simple fact that the department had mailed notice of suspension. However, the trial court found a violation specifically based on the presumption that was created by the proper mailing of the suspension. There was no evidence of actual receipt of the notice. While the Fifth District gave lip service to the inapplicability of such presumption, it still affirmed the trial court which relied soley on that inapplicable presumption. While Petitioner certainly

recognizes that in a probation violation case a different standard of proof applies, there still must be some evidence that Petitioner actually committed a criminal offense. Without proving that she had actual notice of her suspension, no criminal offense was committed. The Fifth District's decision herein cannot be sustained. This Court must quash that decision and remand the cause with instructions to reinstate Petitioner to probation.

CONCLUSION

Based on the foregoing reasons and authorities cited herein, as well as in the initial brief on the merits, the Petitioner respectfully requests that this Honorable Court to quash the decision of the Fifth District Court of Appeal and approve the decisions of the Fourth District in ***Brown v. State, supra*** and the First District Court of Appeal in ***Haygood v. State, supra***.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to the Honorable Pamela Jo Bondi, Attorney General, 444 Seabreeze Blvd., 5th Floor, Daytona Beach, FL 32118, and mailed to Candie Anderson, DOC #U35626, Lowell - Women's Annex, 11120 NW Gainesville Road, Ocala, FL 34482, on this 23rd day of May, 2011.

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MICHAEL S. BECKER
ASSISTANT PUBLIC DEFENDER

CERTIFICATE OF FONT

I hereby certify that the size and style of type used in this brief is 14 point Times New Roman font.

_____
MICHAEL S. BECKER
ASSISTANT PUBLIC DEFENDER