

FILED
THOMAS D. HALL
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IN THE SUPREME COURT OF FLORIDA

BY _____

CASE NO.: SC-12-2424

IN RE: AMENDMENTS TO THE
FLORIDA RULES OF TRAFFIC COURT

**COMMENTS ON THE COMMITTEE'S AND CONFERENCE'S
PROPOSED AMENDMENTS TO FLORIDA
TRAFFIC COURT RULES**

COMES NOW the undersigned attorney, Steven D. Rubin, Esq., and hereby submits his comments to the proposed Amendments to the Florida Rules of Traffic Court, and says:

1. Traffic Hearing Officer Perspective. The undersigned agrees with the Conference of County Court Judges of Florida ("Conference") that no new model colloquy is needed. The undersigned also respectfully submits that no additional required training in the right to remain silent for civil traffic infraction hearing officers as proposed in Fla.R.Traf.Ct. 6.630(g)(1) is needed. The undersigned presently serves as a civil traffic infraction hearing officer ("THO") for the 15th Judicial Circuit (this Comment is not, however, made in the undersigned's capacity as a THO or in behalf of the 15th Judicial Circuit THO program). Over the past ten years, the undersigned has presided over at least 72,000 civil traffic

infraction hearings, including pre-trial hearings and trials, and not once has either a pro se defendant or a defendant represented by counsel asserted the right to remain silent privilege. At least two-thirds of all traffic court defendants are represented by counsel, and counsel presumably knew how to assert the right to remain silent privilege if it had applied in any of those 72,000 cases. These facts tend to show that the proposed changes to the Traffic Court Rules are unnecessary because the assertion of the right to remain silent privilege is a very rare event, at least when a THO presides at a hearing.

This statistic is not surprising for the following reasons. First, the vast majority of civil traffic infractions citations are not issued in conjunction with a criminal matter. Second, if the civil traffic infraction citation is issued in conjunction with a criminal traffic citation, a THO has no jurisdiction to hear the case, and it must be transferred to a county court judge. See Fla. R. Traf. Ct. 6.130 and 6.325(c), and Fla. Stat., 318.32(1)(c)(2011). Third, if there is a pending or threatened criminal prosecution in connection with the civil traffic infraction citation, it is likely the defendant has retained counsel or counsel has been appointed for the defendant in the criminal matter. In such a case, it is most likely

that counsel for the defendant will take advantage of the right to appear at the civil infraction traffic hearing on behalf and in the absence of the defendant, and thus the defendant will not be present to testify. See Fla. R. Traf. Ct. 6.340(c). The Traffic Court Rules Committee has not presented any statistics to show why the new model colloquy is needed.

2. The Proposals. If the Court determines that the Rules of Traffic Court should contain a model colloquy which includes an advisement of the right to remain silent privilege, the undersigned respectfully submits that the proposed colloquies and training should not be adopted for the following reasons:

a. Traffic Court Rules Committee's Proposal.

1. The proposal incorrectly states the substantive law when it requires the court to advise the defendant that the statement may only be used "should you be charged as a result of the incident that gave rise to this citation." The Court, in discussing the substantive aspects of the self-incrimination privilege in the civil context, recognized that the privilege may be raised with respect to a pending or threatened criminal matter, whether or not the criminal matter arose in

the same incident as the civil traffic infraction citation (see In re: Amendments to Fla. Rules of Traffic Court, 37 Fla.L.Weekly S779a (Fla. Dec. 20, 2012)).

2. The proposal incorrectly states the substantive law because its directive would allow the defendant to refuse to testify at the civil traffic infraction hearing if the defendant merely “believes” that the defendant’s actions could give rise to criminal charges. The undersigned respectfully submits that a defendant does not have the right to unilaterally decide whether he can refuse to answer questions at a civil trial based upon his subjective belief. Rather, the court decides whether the privilege applies after the privilege is asserted. See In re: Amendments to Fla. Rules of Traffic Court, *supra*. The privilege may not apply even if the defendant subjectively “believes” it does.
3. The proposal requires the court to give substantive legal advice to the defendant while at the same time, the court is also required to conduct a civil proceeding fairly and impartially. The state and the defendant have many

substantive rights in civil traffic court, and the defendant's privilege against self-incrimination may be one of them. If the court is required to give the defendant advice about the right to remain silent privilege, is it then acting impartially? The undersigned respectfully submits that the court, in this civil proceeding, should not be an advocate for a party (the defendant). See e.g., Fla. Sm. Cl. R. 7.140(e), which directs the court to assist an unrepresented party with procedures in small claims court, but: "The court may not instruct any party not represented by an attorney on accepted rules of law. The court shall not act as an advocate for a party." The right to remain silent privilege is applicable in small claims court proceedings.

It is noted that a defendant in a criminal case will be advised by the court of his right to remain silent at the first appearance (see Fla.R.Crim.P. 3.130(b)). Fla. R. Traf. Ct. 6.180(a), which applies only in criminal traffic matters, states that a defendant shall have the right to remain silent concerning any prior conviction at the time of plea or

sentence, but it does not require the court to advise the defendant of such right. The difference in the application of the cited Rules is that in a criminal proceeding, the right to remain silent always applies, while in a civil proceeding, the right to remain silent may not apply at all.

4. The proposal does not advise the defendant that if the defendant successfully asserts his right to remain silent, the defendant may lose the civil traffic infraction case because the court will not have the benefit of hearing the defendant's testimony. The proposal also does not state what the defendant's remedy is if the court fails to advise the defendant of the right to remain silent, or if the court omits some of the words of the proposed model colloquy. Will the failure or omission be considered a violation of the defendant's substantive rights, thereby creating a new exclusionary rule in the pending criminal proceeding, or will it require the dismissal of the civil traffic infraction? It should be noted that there is rarely, if ever, a record made of traffic infraction citation hearings.

5. With respect to the proposed additional THO training on the right to remain silent privilege, the undersigned respectfully submits that this privilege, together with other privileges, is already encompassed in the training subjects of courtroom control and procedure, traffic court law, evidence, and civil infraction jurisdiction, as set forth in Fla.R.Traf.Ct. 6.630(g). All training materials must already be approved by this Court, and it can withhold approval if it deems any submitted training materials are deficient.

b. Conference's Proposal.

1. The undersigned recognizes that the Conference's proposal was not made as a recommended change, but as an alternative only if the Court is inclined to adopt a new model colloquy. The comments made above with respect to the Traffic Court Rules Committee's proposal apply similarly to the Conference's proposal. The only additional comment is that the reference in the Conference's proposal to the U.S. Constitution as the sole legal basis of the right to remain

silent privilege inadvertently omits a citation to the Florida Constitution.

WHEREFORE, having commented on the proposed Amendments to the Florida Rules of Traffic Court, the undersigned respectfully requests the Court not to adopt them, for the reasons set forth above.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the foregoing was sent by U. S. Mail and electronic mail to Conference Chair, Hon. Debra Roberts, 7530 Little Road, New Port Richey, Florida 34654, ktrulock@verizon.net, Chair, Traffic Court Rules Committee, David Ashley Haenel, 200 N. Washington Boulevard, Sarasota, Florida 34236-5922, david@fightyourcase.com, and Bar Staff Liaison to the Traffic Court Rules Committee, Heather Telfer, 651 E. Jefferson Street, Tallahassee, Florida 32399-2300, htelfer@flabar.org, on this 12th day of March, 2013.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that pursuant to Fla.R.App.P. 9.210(a)(2), this
Comment is typed in 14 point, Times New Roman font.

Respectfully submitted,



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