IN THE SUPREME COURT OF FLORIDA

IN RE: AMENDMENTS TO THE FLORIDA RULES OF TRAFFIC COURT

CASE NO. 12-2424

COMMENT REGARDING PROPOSED CHANGE TO RULE 6.450. ORDER OF HEARING

TO THE HONORABLE JUDGES OF THE SUPREME COURT, IN AND FOR THE STATE OF FLORIDA,

BACKGROUND

The undersigned is a practicing member of the Florida Bar, and for over 25 years has concentrated solely on the defense of those persons charged with traffic offenses. I have served on the Florida Bar Traffic Court Rules committee, have written laws which have been adopted by the legislature, have vigorously appealed cases which I felt unjust, pro bono, and with 20 offices throughout the state of Florida, and over one million cases resolved, I humbly suggest that I may be, in this instance, particularly qualified to address this Honorable Court regarding this issue.

ARGUMENT

Traffic infractions may have serious consequences , particularly in this economy, which should not to be taken lightly. Fines, Court costs, increases in insurance, possible loss of driver's license, and one's livelihood, even a lowering of one's credit rating, all are possible results of a conviction in traffic court.

The Court has before it, two proposals, one, from the Florida Bar Traffic Court Rules Committee ("The Committee"), another from the Conference of County Court Judges ("The Conference"), both containing a patent misstatement of the law, which, if *either* amendment is adopted, will violate the citizens' Constitutional rights under the fifth amendment, made applicable to the states by the afourteenth amendment to the United States Constitution.

What the Committee fails to mention, and the Conference erroneously states, is that a traffic infraction hearing is NOT a civil matter. Nor is it criminal. It is a hybrid of the two, known as a "quasi criminal" case.

This is not a new or novel approach. In *Peoria v. Toft, 215 Ill. App. 3d 440, 574 N.E.2d 1334, 158 Ill. Dec. 941 (Ill. App. 3d. 1991)*. In Illinois, The Toft Court specifically held that parking ticket proceedings were "**quasi criminal,**" and such proceedings involving violations of municipal ordinances are "hybrids presenting aspects of both civil and criminal nature." *Toft, 574 N.E.2d at 1335*. Numerous Courts have noted the **quasi criminal** nature of city, municipal and local ordinances. See, e.g., *Mayer v. City of Chicago, 404 U.S. 189, 196, 92 S. Ct. 410, 30 L. Ed. 2d 372 (1971); Peterson v. Greenville, 373 U.S. 244, 83 S. Ct. 1119, 10 L. Ed. 2d 323; United States v. Skoczen, 405 F.3d 537, 550 (7th Cir. 2005). Thomas v. City of Peoria, 2007 U.S. Dist. LEXIS 7697 (C.D. Ill. Feb. 2, 2007)*.

The Court in Toft further explained:

"....the term "quasi-criminal" has been used in a variety of contexts, oftentimes when courts bestow some protections afforded criminal defendants in civil proceedings. This court referred to forfeiture proceedings as "quasi-criminal" in holding that property owners have an immediate right to contest a vessel seizure. *See F/V Am. Eagle v. State, 620 P.2d 657, 667 n.25 (Alaska 1980)*. Other courts

have referred to proceedings as "quasi-criminal" in granting a right to jury trial in paternity actions, *see B.J.Y. v. M.A., 617 So. 2d 1061, 1063-64 (Fla. 1993)*, and in applying the exclusionary rule to civil penalty proceedings under a drug tax act, *see Sims v. Collection Div. of the Utah State Tax Comm'n*, 841 P.2d 6, 14-15 (Utah 1992)

In determining if a traffic infraction is a purely civil matter, one need look no further than the Florida Statutes, F.S. 318.14 (6), which states:

"the commission of a charged infraction at a hearing under this chapter must be proved beyond a reasonable doubt."

In a forfeiture proceeding, clearly not "criminal" in nature, the Court looked toward the burden of proof required to determine the applicability of the right to remain silent. There, the Supreme Court of the State of Washington stated:

On the low end of the spectrum is the *civil case* involving a monetary dispute between private parties; "[s]ince society has a minimal concern with the outcome of such private suits, plaintiff's burden of proof is a mere preponderance of the evidence. The litigants thus share the risk of error in roughly equal fashion." *Id.* At the high end is the *criminal case* where the interests of the defendant are of such magnitude that the beyond-a-reasonable-doubt standard of proof is "designed to exclude as nearly as possible the likelihood of an erroneous judgment. *Nguyen v. Dep't of Health, 144 Wn.2d 516 (Wash. 2001)*

Accordingly, the burden of proof in a traffic infraction case lays squarely upon the state, and is exactly the same as a criminal matter, *beyond a reasonable doubt*. Obviously, if a traffic infraction was intended to be treated as a civil matter, the state's burden to carry the day would be, as in civil matters, the greater weight, or preponderance of the evidence.

This concept is not new, or novel. The Appellate Court of New York stated, in

Goldhirsch v. New York City Dep't of Transp., etc., 112 Misc. 2d 849, 849-850 (N.Y. Sup. Ct. 1982):

" Parking violations, and traffic infractions in general, have always been quasi-criminal in nature. Until 1970, they were adjudicated in the Criminal Court of the City of New York, and no one at that time could argue that a "traffic ticket" or "summons" did not fit into the clear exception of section 11 of the General Business Law.

By this determination, we accept that motor vehicle violations may be characterized as "quasi-criminal" statutes. *See State v. Hammond*, 118 N.J. 306, 571 A.2d 942 (1990); *State v. Walten*, 241 N.J. Super. 529, 533, 575 A.2d 529 (App.Div. 1990); *Vickey v. Nessler*, 230 N.J. Super. 141, 149, 553 A.2d 34 (App.Div.), *certif. denied* , 117 N.J. 74, 563 A.2d 836 (1989)".

Exactly on point is ,*Chicago v. Berg, 48 Ill. App. 2d 251, 259 (Ill. App. Ct. 1st Dist. 1964).* In *Chicago v.Berg*, id, a driver was taken into custody by the bailiff when he refused to testify in a traffic ticket hearing. The First District Court of Appeals of Illinois, in reversing the lower court, held that the fifth amendment right to remain silent applies in traffic court. It stated that:..

Berg's fear of self-incrimination was not unfounded. He was a defendant, accused of a violation of an ordinance which upon conviction carried a fine up to $ 200....The privilege against self-incrimination in criminal cases, provided for in the Fifth Amendment to the Constitution of the United States and in Article II, sec 10 of the constitution of the State of Illinois, has been interpreted as extending beyond actions that are criminal per se". 58 Am Jur, Witnesses, sec 43; 37 ILP, Witnesses, sec 142.

Citing *People v. Nachowicz, 340 Ill 480, 172 NE 812,* the court said:

"Section 10 of Article 2 of the constitution provides that no person shall be compelled in any criminal case to give evidence against himself. This

constitutional privilege of silence is an absolute guarantee to every person appearing as a witness in any court in this State against being required to answer any question the answer to which will expose or tend to expose him to any penalty, fine, forfeiture or punishment, or tend to accuse him of any crime or misdemeanor, or which will be evidence which will form a link in a chain of evidence to convict him of a criminal offense."

The constitutional protection from being compelled to furnish evidence against oneself has been upheld in civil actions for penalties in cases involving federal laws, state laws and municipal ordinances. *Lees v. United States, 150 U.S. 476 (1893)* was an action to recover a penalty for the violation of an act of Congress prohibiting the importation of aliens under contract to perform labor. The court said:

"This, though an action civil in form, is unquestionably criminal in its nature, and in such a case a defendant cannot be compelled to be a witness against himself." See also, *Boyd v. United States, 116 U.S. 616 (1886). Robson v. Doyle, 191 Ill 566, 61 NE 435 (1901)* was an action to recover penalties imposed by statute for gambling. The court said:

"A defendant may refuse to answer, not only as to fact directly incriminating him, but as to any fact which might form a link in the chain of evidence establishing his liability to punishment, penalty or forfeiture." See also *Rodisch v. Koethe, 178 App 286 (1913)* wherein the court stated in a suit to recover a penalty for wrongfully withholding a will and codicil:

"Where the suit, though civil in form, is brought to recover penalties for alleged offenses against the laws of the State, they are criminal cases within the meaning of the Constitution."

City of Chicago v. Lord, 3 Ill App2d 410, 122 NE2d 439 (1954), affirmed 7 Ill2d 379, 130 NE2d 504, was an action to recover a penalty for exhibiting for profit in a public place of amusement obscene motion picture films, in violation of a

municipal ordinance. The issue concerned the illegal search and seizure of the films. The court affirmed the suppression of the evidence by the trial court and rejected the City's argument that the guaranty against compulsory self-incrimination could be invoked only in criminal cases and not in proceedings of a civil nature. In doing so the court spoke of the close correlation between, and the complementary nature of, sections 6 and 10 of article II of the Illinois Constitution and the respective guaranties of the Fourth and Fifth amendments to the Constitution of the United States against unreasonable searches and seizures and self-incrimination.

Thus, the Court in *Chicago v. Berg*, id. said that the distinction between a criminal proceeding and a civil one for the imposition of a penalty was somewhat illusory and stated:

"An action for violation of a City ordinance like other proceedings for penalties and forfeitures because of the violation of a public law, is criminal in nature."

The defendant had a right to invoke his constitutional privilege against self-incrimination and the trial court was in error in threatening to punish him if he did not aid the City in obtaining his own conviction, in finding him in contempt of court and in depriving him of his liberty. A court has no jurisdiction to punish for contempt where no contempt has been committed. ***Chicago v. Berg, 48 Ill. App. 2d at 259.***

In applying the fifth amendment to a medical board hearing, it was stated:

At its heart this case concerns the process due an accused physician by the state before it may deprive him his interest in property and liberty represented by his professional license. "Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." ***Mathews v. Eldridge*****, 424 U.S. 319, 332, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). A medical license is a constitutionally protected property interest which must be afforded due process.** ***Painter v. Abels*****, 998 P.2d 931, 940 (Wyo. 2000);** ***Johnson v. Bd. of Governors*****, 1996 OK 41, 913 P.2d 1339, 1345 (Okla. 1996);** ***see also Wash. Med. Disciplinary Bd. v.***

***Johnston*, 99 Wn.2d 466, 474, 663 P.2d 457 (1983)** **("A professional license revocation proceeding has been determined to be 'quasi-criminal' in nature and, accordingly, entitled to the protections of due process..."** *Id.*

Because forfeiture proceedings are **quasi-criminal** in character, the exclusionary rule applies barring evidence obtained in violation of the Fourth Amendment. *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 696, 14 L. Ed. 2d 170, 85 S. Ct. 1246 (1965). United States v. $7,850.00 in United States Currency, 7 F.3d 1355, 1356 (8th Cir. Minn. 1993)

Although the Florida legislature saw fit to decriminalize traffic infractions, it was for purposes of expediency, not to invite citizens to implicate themselves. Similarly, when the State of New York decriminalized parking violations, the court held;

In 1969, the law (Vehicle and Traffic Law, § 155) was amended so as to create the PVB as an administrative agency, and to transfer the authority to hear such matters from the Criminal Court to the PVB, in order to relieve congestion in the Criminal Court. It was not the intent of **[*850]** the Legislature to change the nature of the parking violation but merely to change its place of hearing (*Matter of Voccola v Shilling*, 88 Misc 2d 103). Goldhirsch v. New York City Dep't of Transp., etc., 112 Misc. 2d 849, 849-850 (N.Y. Sup. Ct. 1982) .

In **Florida** the protections afforded persons against self-incrimination in criminal cases by the fifth amendment and made applicable to the states by the fourteenth amendment have been expanded to include civil cases, and administrative proceedings, even where the testimony will not lead to criminal charges. See, *State of Florida ex rel. J. Bruce VINING, Relator, v. FLORIDA REAL ESTATECOMMISSION, Respondent, 281 So. 2d 487 (Fl.1973).* (right to remain

silent belongs to realtor in board proceeding, citing case where it also applies to attorney in bar proceeding, and doctor in medical board proceeding.

In *Vining, id.*, where a licensed Real estate Broker was being compelled to testify, the Supreme Court of Florida stated:

Since the burden of proving the defendant's guilt is the obligation of the State in any event, requiring the defendant to speak would amount to compelling the defendant to prove the State's case for it. This, of course, is the evil sought to be remedied by the Fifth Amendment right to silence. ***Vining, id, at 491***

It has been held, in Florida, that a fine, in and of itself, is enough of a "penalty" to create a "quasi-criminal" case: In *Pollgreen v. Morris, 579 F. Supp. 711, 717-718 (S.D. Fla. 1984),* the United States District Court for the Southern District of Florida stated:

the imposition of a fine as a penalty for violation of the law can be considered "quasi-criminal" in nature, stating (citations omitted).At the outset, the Court would note that while technically these cases are civil actions, the imposition of a fine as a penalty for violation of the law can be considered 'quasi-criminal' in nature.

As set forth above, the Florida Statute 318.14 (6) requires the State to prove its' case beyond a reasonable doubt.

In traffic court, not only would the denial of the right to remain silent impermissibly shift the burden from the State to the defendant, as the the Vining Court points out:

" In succinct terms, it is our view that the right to **remain silent** applies not only to the traditional criminal case, but also to proceedings "penal" in nature in that they tend to degrade the individual's professional standing, professional reputation or livelihood." *Vining, id, at 492.*

Here, it is undisputed that a traffic infraction has serious consequences which are clearly penal in nature. Fines and costs may exceed $1000. It is common knowledge that a conviction of as traffic offense may result in significantly higher

insurance premiums. Some citations may result in a suspension, or revocation of ones driver's license. Additionally, the under the point system according to the DHSMV ,a conviction may also result in loss of license. A loss of one's driver's license may result in loss of livelihood, inability to attend school or college, or care for a family, especially in rural parts of Florida where public transportation is limited. Clearly, the penal nature of the consequences of a traffic infraction cannot be overlooked, and hence, the application of the protections afforded by the fifth and fourteenth amendments.

CONCLUSION

As set forth above, the right to remain silent applies in traffic court, since to do otherwise would result in an impermissible shifting of the burden of proof, and because of the "quasi- criminal" nature of the charge, the rule amendments, proposed by both the Committee, and the Conference are a gross misstatement of the law, and both should be rejected. It is respectfully requested that this Honorable Court do just that, and further, instruct the Traffic Court Rules Committee, to write a new proposal, in keeping with the law as set forth above, advising all persons that the right to remain silent applies.

Respectfully submitted,

Mark S. Gold for
The Ticket Clinic, a law firm
2298 South Dixie Highway
Miami, Florida, 33133
FB 359051

I hereby certify that a true and correct copy of the foregoing was sent by U.S. mail and email to Conference Chair, Debra Roberts, 7530 Little Road, New Port Rickey, Fl, 34654, ktrulock@verizon.net, the Rules Committee Chair, David

Ashley Haenel, 200 N. Washington Boulevard, Sarasota, Florida 34236-5922, david@fightyourcase.com, and the Bar Staff Liaison Committee, Heather Telfer, 651 E. Jefferson Street, Tallahassee, Florida 32399-2300, htelfer@yahoo.com on this 14th day of March, 2013.

By.:
MARK S. GOLD, ESQ.