

IN THE SUPREME COURT OF FLORIDA

IN RE: AMENDMENTS TO) CASE NO. SC12-38
FLORIDA TRAFFIC RULES)
OF COURT)

RESPONSE OF THE COUNTY COURT JUDGES OF THE
SEVENTEENTH JUDICIAL CIRCUIT

Judge Sharon Zeller, as Administrative County Court Judge for the Seventeenth Judicial Circuit of Florida, and on behalf of the County Court Judges and Traffic Hearing Officers of the Seventeenth Judicial Circuit, files this response opposing the proposed amendment to Florida Traffic Court Rule 6.340.

The proposed amendment adds the following to the Florida Traffic Court Rules: “*(d) Testimony of Accused. No accused person shall be compelled to give testimony against himself or herself.*”

As the reported legal authorities have not broadly extended the privilege against self-incrimination to civil traffic infractions,¹ the Bar Committee is seemingly attempting to use the amendment to create a “right” that does not exist under the Constitution. Indeed, if the privilege against self-incrimination applies to civil traffic infractions, a rule would not be necessary to make it available.

At the outset, the Fifth Amendment privilege against self-incrimination, by its own language, was established to apply in criminal cases:

¹ *State v. Coupal*, 626 So.2d 1013, 1015 (Fla. 2d DCA 1993); *Barwell v. City of Boca Raton*, 10 Fla. L. Weekly Supp. 591 (Fla. 15th Cir. Ct. 2003) (appellate capacity, affirming Palm Beach County Court); *Kaleel v. State*, 4 Fla. Supp. 2d 141 (Fla. 6th Cir. Ct. 1981) (appellate capacity, affirming Pinellas County Court).

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

While the accused may have the option to assert the Fifth Amendment in a civil case, there are adverse consequences to the assertion of the Fifth Amendment in a civil action.

The United States Supreme Court has held that “the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them.” *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976). The *Baxter* Court quoted Justice Brandeis, who had earlier stated, “Silence is often evidence of the most persuasive character.” *Id.* at 319. In *Baxter*, the state was entitled to an adverse inference against Palmigiano because of the evidence against him and his assertion of the Fifth Amendment privilege.

Furthermore, if such right were created by incorporating the suggested language, it could arguably eliminate the adverse inference that a judge or presiding official is currently permitted to draw should the accused decline to offer testimony – an inference permitted as stated in *Baxter v. Palmigiano*. In other words, if you give the accused a right to remain silent, it might be legally inappropriate to draw a negative adverse inference from the assertion of the right.

It is important to note, however, that the Fifth Amendment “not only protects the accused against being involuntarily called as a witness against himself in a criminal prosecution but also privileges them not to answer questions put to them in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings.” *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973). It is clear that civil traffic infraction hearings are not criminal proceedings. That being said, should an accused be compelled in that civil trial to furnish testimonial evidence that might incriminate him/her in a subsequent criminal trial, he/she should be given the opportunity to assert her Fifth Amendment privilege – not because such right exists in all civil traffic proceedings but because of the likelihood that her civil trial testimony could be used in his/her

future criminal prosecution. However, this right *currently exists*, notwithstanding the absence of a procedural rule to recognize it, and there clearly is no need of a rule to implement that right.

In Broward County alone, more than 5,000 civil traffic infractions are actually heard by County Court Judges and Traffic Hearing Officers each week. In the far great majority of these cases, defendants are not questioned. Occasionally, however, a particular case will present an issue which causes a judge or traffic hearing officer to question the civil traffic defendant. The Seventeenth Judicial Circuit believes the judge or traffic hearing officer should continue to be able to exercise discretion to proceed with the questioning.

If this amendment were to be adopted, the Seventeenth Judicial Circuit is also concerned with the possible increase in litigation of issues involving whether this new rule steps over the line of procedure into substantive law, thus invading the province of the Legislature.

Both *Barwell* and *Kaleel*, *supra* note 1, involved cases in which judges questioned civil traffic defendants, resulting in the defendants using the appellate process. The Seventeenth Judicial Circuit notes that this avenue continues to be available to civil traffic defendants today. Moreover, if the Bar Committee believes, as it suggests in its Cycle Report, that the right already exists, then it also has available to its Members the possibility of bringing specific cases before the appellate courts to further allow this issue to be discussed, argued, and briefed. In lieu thereof, the Seventeenth Judicial Circuit does not believe, however, a broad-brush rule change should be adopted.

Respectfully submitted February 16, 2012,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished by United States mail to Jill Marie Hampton, Esq., 733 W. Colonial Drive, Orlando, FL 32804-7343 this 16th day of February, 2012.

CERTIFICATE OF COMPLIANCE

I certify that this report was prepared in accordance with the font requirements of Fla. R. App. P. 9.210(a)(2).

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