IN THE SUPREME COURT OF FLORIDA

NILS FUTCH,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

Case No.: SC14-1660
L.T. Case No(s).: 5D13-3457

ON DISCRETIONARY REVIEW FROM THE
FIFTH DISTRICT COURT OF APPEAL

PETITIONER'S REPLY BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

In this brief, Petitioner shall be referred to as Petitioner or Futch. Respondent shall be referred to as Respondent or Department. Counsel for Futch is cognizant that a record has been transmitted electronically by the Fifth District and references to that record will be made by (R-), however, as Counsel cannot access the page numbers in the record; Futch's appendix as filed in the Fifth District, shall be referred to by the letter "A," followed by the page number utilized in the Fifth District (A-__) for clarity. Futch's Appendix, filed with this brief shall be referred to as by the letter "SA" followed by the page number (SA-__); other than the transcript of the Formal Review on April 16, 2013, in said appendix which shall be referred to as "T" followed by the page number of the transcript (T-___).

ARGUMENT IN RESPONSE

ISSUE I

THE FIFTH DISTRICT APPLIED THE WRONG STANDARD BY QUASHING THE ORDER OF THE CIRCUIT COURT BASED UPON A FINDING "THAT THE CIRCUIT COURT MISAPPLIED THE LAW."

The Departments brief does not dispute that the opinion of the Fifth District by stating: "Because we conclude that the circuit court misapplied the law (emphasis supplied) when it directed DHSMV to set aside the suspension and reinstate Futch's driver's license, we grant the petition for writ of certiorari" was in

conflict with multiple decisions including *Dep't of Highway Safety & Motor Vehicles v. Robinson*, 93 So. 3d 1090, 1092 (Fla. 2d DCA 2012), rev. denied, 112 So. 3d 83 (Fla. 2013), Ivey *v. Allstate Ins. Co.*, 774 So. 2d 679, 682 (Fla. 2000), *Stranahan House, Inc. v. City of Fort Lauderdale,* 967 So.2d 1121, 1125 (Fla. 4th DCA 2007), *Fassy v. Crowley*, 884 So. 2d 359, 364 (Fla. 2d DCA 2004), *Allstate Ins. Co. v. Kaklamanos*, 843 So. 2d 885, 889 (Fla. 2003), and *Town of Longboat Key v. Islandside Prop. Owners Coal., LLC*, 95 So. 3d 1037, 1043 (Fla. 2d DCA 2012) but simply argues that the Fifth District should be affirmed as the Department believes that the circuit court decision was a miscarriage of justice. The Fifth District correctly affirmed the portion of the circuit court ruling which found that Futch was denied due process and the Departments order should be quashed. The Fifth District opinion clearly cited to an incorrect standard in conflict to multiple cases and should be quashed. The miscarriage of justice argument will be replied to in issue II and III.

ISSUE II

THE CIRCUIT COURT DID NOT VIOLATE A CLEARLY ESTABLISHED PRINCIPLE OF LAW WHICH RESULTED IN A MISCARRIAGE OF JUSTICE

II(A) Introduction: The Departments answer brief does not cite to *Hernandez v. Dep't of Highway Safety and Motor Vehicles*, 74 So.3d 1070 (Fla. 2011), the lead case in Florida, which found that proceedings of this type must be

construed and applied in a manner which comports with the requirements of the Florida Constitution including the right to due process. In *Hernandez* this court stated:

> Here, the interpretation of the statutes urged by DHSMV would allow the DHSMV to suspend a driver's license without reasonable notice and no possibility of a meaningful process to review the lawfulness of the suspension.
>
> A reading of section 322.2615 to prohibit review of an unlawful license suspension would lead to an unreasonable result that would render the statutory scheme constitutionally infirm. We have held that "[s]tatutes, as a rule, 'will not be interpreted so as to yield an absurd result.' " *State v. Iacovone,* 660 So.2d 1371, 1373 (Fla.1995) (quoting *Williams v. State,* 492 So.2d 1051, 1054 (Fla.1986)). Further, "[t]his Court has an obligation to give a statute a constitutional construction where such a construction is possible." *Tyne v. Time Warner Entm't Co.,* 901 So.2d 802, 810 (Fla.2005). We conclude that the only reading of the statute that avoids an unreasonable and unconstitutional result is to construe sections 322.2615 and 322.1932 *in pari materia* and allow the hearing officer to review whether the test was administered incident to a lawful arrest.
>
> *Hernandez* at 1079 (Fla. 2011), Emphasis Supplied

Here as in Hernandez the Department takes position which would lead to an unreasonable result. To accept the Department's position in this instance would render the right to prompt and meaningful judicial review illusory. The circuit court construed and applied the statutes in a manner consistent with the Florida Constitution and no miscarriage of justice occurred.

II (B). If Prompt, Meaningful Review is not provided then System is Unconstitutional as Applied:

It appears to be undisputed that pursuant to the Florida Constitution, Article I, section 21 "Access to Courts" and/or Federal Constitution that a suspendee such as Futch is entitled to prompt and meaningful post-deprivation review. The issue appears to be simply whether the circuit court has the authority to provide "effectual" relief based upon the circumstances of a pending case or in the alternative is prohibited from remanding for invalidation on cases involving a due process violation. The applicable statutes should be construed in a manner which affords the circuit court the authority to provide prompt and meaningful relief, see generally *Hernandez*, supra.

II (C) First Tier Statutory Certiorari Review:

The Departments brief states:

> In any situation where the appellate court grants a writ of certiorari, the appellate court must always remand the case back to the lower tribunal for further proceedings consistent with the opinion. Depending on the reason for the remand, this could equate to a direction to the Department to either hold a new hearing, or to issue a new final order invalidating the driver's DUI administrative suspension. Otherwise, the appellate court's decision and mandate would be ineffectual.
>
> Answer Brief at Page 16

Accordingly the Department has conceded that the circuit court does have the power to remand to issue a new final order which "could equate to a direction to the Department" to invalidate an administrative suspension. It should be noted that Futch did not and has not received a "DUI administrative suspension" as stated by the Department but this case involves a refusal suspension. Futch does not

argue that every remand must be for the purposes of invalidation as opposed to a new hearing but suggests each case should be decided on its own facts. Here the circuit court specifically found that invalidation was appropriate in light of the egregious due process violation(s) in the first hearing combined with the fact that as applied Futch would not actually receive prompt and meaningful judicial review.

On first tier statutory review the circuit court should have the power to invalidate a suspension especially in light of the statutory language indicating that invalidation is a remedy authorized by the legislature for undue delay. In *Broward Cnty. v. G.B.V. Int'l, Ltd.*, 787 So. 2d 838, 842 (Fla. 2001), this court discussed second tier common law certiorari review. Footnote 9 is especially enlightening as it discusses the Florida Constitution and states:

> 9 See, e.g., *Haines City Community Dev. v. Heggs*, 658 So. 2d 523, 526 (Fla. 1995) ("Certiorari should not be used to grant a second appeal."); id. at 526 n.4 ("If the role of certiorari was expanded to review the correctness of the circuit court's decision, it would amount to a second appeal. **If an appellate court gives what amounts to a second appeal, by means of certiorari, it is not complying with the Constitution, but is taking unto itself the circuit courts' final appellate jurisdiction and depriving litigants of final judgments obtained there.**"); *Combs v. State*, 436 So. 2d 93, 96 (Fla. 1983) ("The district courts should use this discretion cautiously so as to avert the possibility of common-law certiorari being used as a vehicle to obtain a second appeal.").
>
> (Emphasis supplied.)

First-tier certiorari review is not discretionary but rather is a matter of right and is akin in many respects to a plenary appeal, *Broward Cnty. v. G.B.V. Int'l, Ltd.,* 787 So.2d 838, 843 (Fla.2001). The distinction between first tier statutory certiorari review and second tier common law certiorari review are more fully discussed in the Response in the circuit court, see (S.A.-69-72), and Futch's response in the Fifth District (A-298-304), however, it appears that the Department does not actually not dispute the ability of the circuit court to remand for invalidation but is arguing that the invalidation was not authorized in this particular case.

II(D) This Hearing Officer and Hearing:

Futch's argument is overstated by the Department. Futch maintains that the circuit court courtly found under the facts of this specific case he was denied his right to a prompt and meaningful hearing before a neutral hearing officer; see e.g. *DHSMV v. Pitts*, 815 So.2d 738 (Fla. 1st DCA 2002) and *Department of Highway Safety & Motor Vehicles v. Griffin*, 909 So. 2d 538 (Fla. 4th DCA 2005). The record establishes the hearing officer was following an established Department policy of not allowing drivers to present evidence or to even fairly proffer the testimony of Andrew Cospito. A complete proffer may have established, for example, that one area of testimony for Cospito would have been that he had promptly visited the location of the incident, and could clarify the issues about the location, and whether it was in a business or residential district as defined in

Florida law. Certainly the fact that the Department, (the opposing party in these proceedings), employs and appears to control the "neutral" hearing officer, combined with the lack of reasonable promulgated criteria, as to qualifications for the hearing officer might cause an objectively reasonable person to question the hearing officers neutrality; however Futch concedes it is possible to have an unbiased hearing officer assigned to a formal review. In this case the circuit court found this particular suspendee was denied due process and the hearing officer departed from her role as neutral and detached magistrate. In this instance the hearing officer had the incentive to rule in the manner preferred by her superiors at the Department, but suffers no sanction for violating due process rights of suspendees such as Futch. In fact if the Department's position is correct the hearing officer always gets an additional bite at re-imposing a suspension after an egregious due process violation, even after the suspension has been fully served; compare *Dep't of Highway Safety & Motor Vehicles v. Azbell*, 154 So. 3d 461, 462 (Fla. 5th DCA 2015).

II(E) Mootness:

Futch did not argue in the circuit court or in his response in the Fifth District that the issues were moot as his suspension was not yet been fully served. The mootness argument in this context flows from *McLaughlin v. Dep't of Highway Safety & Motor Vehicles*, 2 So. 3d 988, 989 (Fla. 2d DCA 2008) decision quashed sub nom. *Florida Dept. of Highway Safety & Motor Vehicles v. Hernandez*, 74 So.

3d 1070 (Fla. 2011) on remand *McLaughlin v. Dep't of Highway Safety & Motor Vehicles*, 128 So. 3d 815 (Fla. 2d DCA 2012) wherein the court stated:

> Although we are quashing the circuit court's order, we observe as we did in our prior order that the Department suspended Mr. McLaughlin's driver's license for a period of one year on January 7, 2007. Thus the suspension period expired while this matter was on review. Accordingly, other than quashing the administrative order, no further proceedings are necessary on remand because the issue of the validity of the suspension of Mr. McLaughlin's driver's license is moot.

Accordingly while no stay was available Mr. McLaughlin served his entire suspension and suffered the related consequences of the negative entry from January 7, 2007 until sometime after March 9, 2012. The Department now argues that the Second District exceeded its authority in *McLaughlin* by directing invalidation. *McLaughlin v. Dep't of Highway Safety & Motor Vehicles*, 128 So. 3d 815 (Fla. 2d DCA 2012), and its progeny cited in the initial brief have found that when the term of the drivers license suspension has expired during judicial review and the order of the Department suspending the license has been quashed by the courts, that no further proceedings are appropriate on remand other then reinstating the drivers license. This is a pragmatic approach as the initial controversy as to whether the drivers licenses should be suspended is no longer an issue. Further due to the lack of a stay pending review the "quashed" suspension has already been fully served causing the driver irreparable damage. Concepts of fundamental fairness and considerations pertaining to prompt and meaningful

judicial review certainly support the position that a second hearing should not be required. As applied denial of a commercial drivers license for a year under a system which as applied does provide prompt, final, judicial review or a discretionary stay pending review appears to be unfairly punitive as the suspension causes irreparable harm.

In *State v. E.I.,* 114 So. 3d 309, 310 (Fla. 4th DCA 2013) the court found issues related to dismissal of a juvenile petition to be moot as the child had turned 19. The court stated:

> "A case becomes moot, for purposes of appeal, where, by a change of circumstances prior to the appellate decision, an intervening event makes it impossible for the court to grant a party any effectual relief." *Montgomery v. Dep't of Health & Rehab. Servs.,* 468 So.2d 1014, 1016 (Fla. 1st DCA 1985). A moot case will generally be dismissed unless the questions raised are of great public importance or are likely to recur, or if collateral legal consequences that affect the rights of a party flow from the questions raised. *Godwin v. State,* 593 So.2d 211, 212 (Fla.1992). We find none of these exceptions apply; therefore, we dismiss this case as moot.

The court in *E.I* did not require a new hearing on remand simply due to the possibility that proceeding might result in a negative entry on the litigant's record for future sentencing/penalty purposes. When the Fifth District found that Judge Parsons order quashing the suspension was affirmed, the controversy should have been resolved as moot consistent with *McLaughlin* as the only action required on remand was to invalidate the expired suspension. Once the suspension order was quashed and removed from Futch's driving history there were no pending

collateral legal consequences to be determined in this controversy. This results from the fact that suspension could not be stayed. The argument that a re-entered suspension entry could possibly become relevant for enhancement purposes if Futch refused to submit to a lawful breath test in the future is too speculative to avoid the mootness doctrine. The court and counsel are entitled to assume that the defendant will obey the law in the future and not commit crimes, See *Hogan v. State*, 931 So. 2d 996, 998 (Fla. 3d DCA 2006). At this time there is no collateral legal consequence to the Department which is affected by applying the mootness doctrine to this expired suspension which has been quashed on judicial review.

McLaughlin and its progeny seem to acknowledge a pragmatic issue. At some point it makes no sense for a citizen to continuous litigate a sanction which has been served. At some point justice delayed is justice denied and it would be unduly burdensome for Futch to file a second Petition for Writ of Certiorari in this cause and commence a second appellate journey. There is a societal interest in ending litigation with a reasonable length of time and eliminating or minimizing multiple appeals, see generally *Nader v. Florida Dept. of Highway Safety & Motor Vehicles*, 87 So. 3d 712, 723 (Fla. 2012) and finding an issue moot when appropriate furthers this interest.

II (F). Conclusion:

To find that the circuit court on the facts of this case lacked the authority to

determine that the suspension of a commercial driver's license should be invalidated on remand is to render the circuit court ineffectual and the right to prompt judicial review illusory. The circuit court ruling did not violate a clearly established principle of law or result in a miscarriage of justice.

ISSUE III

THERE WAS A LACK OF COMPETENT, SUBSTANTIAL EVIDENCE IN THE RECORD TO ESTABLISH THE WARRANTLESS STOP WAS LAWFUL.

Here Futch has maintained from the commencement of these proceedings that the 707 lacks sufficient factual information to establish probable cause (for a violation of Sec. 316.125. The Department's brief does not maintain that there was competent, substantial evidence that Futch was in a Business District as defined in § 316.003(4) Fla. Statutes, but argues that Futch has misinterpreted the statute which states in relevant sections:

> 316.125. Vehicle entering highway from private road or driveway or emerging from alley, driveway or building:
> (1) The driver of a vehicle **about to enter or cross** a highway from an alley, building, private road or driveway shall yield the right-of-way to all vehicles approaching on the highway to be entered which are so close thereto as to constitute an immediate hazard.
> (2) The driver of a vehicle **emerging** from an alley, building, private road or driveway **within a business or residence district** shall stop the vehicle immediately prior to driving onto a sidewalk or onto the sidewalk area extending across the alley, building entrance, road or driveway, or in the event there is no sidewalk area, shall stop at the point nearest the street to be entered where the driver has a view of approaching traffic

> thereon and shall yield to all vehicles and pedestrians which are so close thereto as to constitute an immediate hazard.
>
> (Emphasis supplied)

In the answer brief the Department makes the argument that section 316.125(2) applies to every "business" as opposed to a "business district". The Departments broad interpretation of the scope of this statute is improper, see e.g. s*ee DHSMV v. Meck*, 468 So.2d 993 (Fla. 5th DCA 1984), (A- 54-56), *Kasischke v. State*, 991 So. 2d 803, 814 (Fla. 2008), and Maxwell *v. State*, 110 So.3d 958 (Fla. 4th DCA 2013), (A-57-60). Misinterpretations of this type help clarify why Futch did not get a fair hearing before the Department Hearing Officer. In addition while the answer brief refers to the standard as both "probable cause" and "founded suspicion" the applicable standard on the facts of this case is whether the officer had objective probable cause to believe that a traffic violation has occurred, *Whren v. United States*, 517 U.S. 806, 810 (1996).

In this record there was no evidence that the offense occurred in a business or residential district as defined. There is also no evidence that vehicles or pedestrians were so close as to constitute an immediate hazard in this instance. Further the Department has not responded to the argument that the word "emerge" in § 316.125(2) should be strictly construed and should be interpreted to have a more narrow scope then the words "enter or cross" in section § 316.125(1). Utilizing a proper construction of 316.125 merely failing to stop when exiting a

business parking lot is not a violation and there was a lack of competent, substantial evidence to establish probable cause for the warrantless stop of Futch.

CONCLUSION

It is respectfully requested that this honorable court quash the ruling of the Fifth District in this cause for the reasons set out herein. Whether a circuit court can provide meaningful relief by directing invalidation of a suspension based upon a substantial due process violation is a question of great public importance. It is fundamentally unfair to have a system where a right to judicial review is provided by the applicable statute and the Florida Constitution but as applied judicial review is frequently not available until after the entire suspension period has expired.

CERTIFICATE OF FONT AND TYPE SIZE

Counsel certifies that this brief was typed in Times New Roman 14.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that a true and correct copy of the foregoing has been furnished via e-mail to Jason Helfant, Esquire, Department of Highway Safety and Motor Vehicles, Department of Highway Safety and Motor Vehicles at jasonhelfant@flhsmv.gov and alejandraperez@flhsmv.gov this 4th day of August, 2015.

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