IN THE SUPREME COURT OF FLORIDA

BYRON MCGRAW,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

Case No. SC18-792

ON DISCRETIONARY REVIEW FROM THE
FOURTH DISTRICT COURT OF APPEAL

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

The petitioner, Byron McGraw, was the defendant in the trial court and the appellant before the Fourth District Court of Appeal. The petitioner will be referred to herein as "appellant." The respondent, State of Florida, was the prosecution in the trial court and the appellee before the Fourth District Court of Appeal. The respondent will be referred to as "appellee" or "the State."

In this brief, the following symbols will be used:

AB = Amicus Brief

IB = Appellant's Initial Brief on the Merits

R = Record on Appeal Before Fourth District Court of Appeal (pdf)

R2 = Record on Appeal Before Supreme Court of Florida (pdf)

STATEMENT OF THE CASE AND FACTS

Appellant was charged in Palm Beach County Court with two counts of driving under the influence causing or contributing to injury to person or property. (R. 38-39). The arrest report indicated that the police responded to a single-car accident involving a "flipped vehicle" at approximately 7:30 a.m. on April 16, 2016. Id. at 35. Appellant was the driver and sole occupant of the vehicle. Id. Officer DeSantis arrived and began to assess the scene of the crash. Id. Officer DeSantis determined that appellant was heading northbound on Military Trail when his vehicle left the roadway and went onto a traffic island. Id. at 36. Appellant's vehicle crossed over two lanes of eastbound traffic, struck a concrete median, and then crossed five lanes of westbound traffic on the Beeline Highway. Id. Appellant's vehicle then hit a curb, went airborne, struck a palm tree, returned to the ground, rolled over, and ultimately came to a final stop on its roof on a pedestrian sidewalk. Id.

When fire rescue removed appellant from the vehicle, Officer DeSantis detected the odor of an alcoholic beverage emanating from appellant's breath, skin, and clothing. Id. at 35. Officer DeSantis traveled with appellant to the hospital, where he was treated for unknown injuries. Id. Appellant was unconscious at the hospital. Id. Officer DeSantis was investigating a possible DUI, so he had a nurse draw blood from appellant. Id. Appellant's consent to the blood draw was implied

due to his lack of consciousness. Id. Appellant's blood alcohol content was 0.195. Id. at 36. Appellant was arrested for DUI. Id.

Appellant filed a motion to suppress the results of the blood test. Id. at 52-55. Appellant argued the blood draw in this case violated his Fourth Amendment rights as set forth in Missouri v. McNeely, 133 S. Ct. 1552 (2013) and Birchfield v. State, 136 S. Ct. 2160 (2016). Id. At the evidentiary hearing on appellant's motion to suppress, Officer DeSantis testified that the police and fire rescue were already present when he responded to the crash scene. Id. at 125-126. Fire rescue cut away at portions of appellant's vehicle to extricate him from it. Id. at 127. Appellant was unconscious, unresponsive, and the smell of an alcoholic beverage emanated from his body, clothing and vehicle. Id.

Appellant was placed on a stretcher and taken to the hospital. Id. at 127-128. Officer DeSantis followed the ambulance to the hospital. Id. at 128-129. When Officer DeSantis contacted appellant at the hospital, he was still unconscious and in a neck brace. Id. at 129. The hospital staff were treating appellant, who appeared to have bumps, bruises, and scratches on his body. Id.

Officer DeSantis was investigating a possible DUI and rubbed appellant's sternum to see if there would be any reaction. Id. at 130. Appellant did not respond to the sternum rub conducted by Officer DeSantis or the registered nurse. Id. The hospital staff could not, and did not, give Officer DeSantis any

information regarding how long they thought appellant would remain at the hospital. Id. Based on the circumstances of the investigation, Officer DeSantis requested the nurse draw appellant's blood. Id. at 131. Officer DeSantis was at the hospital for under an hour. Id. Officer DeSantis did not recall asking a doctor or nurse how long appellant would be unconscious. Id. at 136-138. Officer DeSantis left the hospital after the blood draw was completed and he did not know when appellant regained consciousness. Id. at 136-137. Officer DeSantis did not ask appellant to submit to a breath or urine test because he was unconscious. Id. at 138-139. No alcohol was found inside appellant's vehicle. Id. at 142.

The trial court entered an order denying appellant's motion to suppress. Id. at 67-75. The trial court found that section 316.1932(1)(c) of the Florida Statutes did not provide consent to the blood draw in light of McNeely, Birchfield, and State v. Liles, 191 So. 3d 484 (Fla. 5th DCA 2016). Id. at 70-71. The trial court also found Officer DeSantis made no attempt to obtain a warrant for the blood draw. Id. at 72. However, the trial court concluded that the "good faith" exception to the exclusionary rule applied in this case and denied appellant's motion to suppress. Id. at 73. The trial court found that Officer DeSantis proceeded "in objectively reasonable reliance on the validity of the current statute." Id. The trial court certified a question of great public importance to the Fourth District Court of Appeal in its order. Id. at 73-74. Appellant subsequently entered a plea to one

count of DUI (crash enhanced) and was adjudicated guilty. Id. at 87-88, 172-173. Appellant reserved the right to appeal the trial court's ruling on the motion to suppress. Id. at 173. Appellant was adjudicated guilty and placed on probation for twelve months. Id. at 90.

Appellant appealed to the Fourth District, which accepted jurisdiction over the case. (R2. 66). The Fourth District thoroughly analyzed the impact of McNeely, and Birchfield on section 316.1932(1)(c) of the Florida Statutes. McGraw v. State, 245 So. 3d 760 (Fla. 4th DCA 2018). The Fourth District noted that the decision in Birchfield "held that implied consent laws that do not impose criminal penalties are constitutionally valid. If no implied consent law could survive the Fourth Amendment, the Court would have stated as much." Id. at 766-767. After surveying a host of post-Birchfield cases from other states, the Fourth District concluded that the Colorado Supreme Court's decision in People v. Hyde, 393 P.3d 962 (Colo. 2017) was the most persuasive and answered the rephrased certified question affirmatively. McGraw, 245 So. 3d at 762, 767.

Judge Gross dissented in part from the majority's opinion in McGraw. According to Judge Gross, the Fourth District should have held that section 316.1932(1)(c) of the Florida Statutes was unconstitutional. Id. at 771. However, Judge Gross agreed that the trial court's ruling should be affirmed under the "good faith" exception to the exclusionary rule. Id. The majority concluded that it need

not reach the argument on the "good faith" exception because no Fourth Amendment violation occurred in this case. Id. at 770. Nevertheless, the majority stated that if it were to reach the issue, it would "affirm the trial court's application of the good faith exception." Id.

Appellant subsequently moved to certify a question of great public importance to this Court. (R2. 195-203). The State opposed appellant's motion because he never claimed the question raised in this case was one of great public importance that required resolution before this Court until after the Fourth District rejected his argument on the merits. Id. at 204-205. The Fourth District granted appellant's motion and certified a question of great public importance. McGraw, 245 So. 3d at 778. The Court accepted jurisdiction over this case.

SUMMARY OF ARGUMENT

The Court should discharge its jurisdiction. Florida law is clear that the courts should not pass upon the constitutionality of statutes if the case in which the question arises may be effectively disposed of on other grounds. The instant case can effectively be resolved on other grounds, i.e., the blood draw was permissible under the good faith exception to the warrant requirement. Accordingly, the Court should dismiss review of this case.

If the Court retains jurisdiction over this case, it should answer the question certified by the Fourth District affirmatively. The portion of Florida's Implied

Consent Law at issue in this case does not impermissibly burden appellant's Fourth Amendment rights. Consent is a well-established exception to the warrant requirement and there is nothing unusual or extraordinary about consent being implied through conduct rather than expressed through words. A traveler who carries a bag on a commercial flight impliedly consents to a search of the bag. Similarly, a traveler who drives an automobile (a dangerous instrumentality) on Florida's roadways impliedly consents to a blood-alcohol test required by state law as a condition of using the roads. Thus, appellant consented to the blood test in this case when he accepted the privilege of driving on Florida's roadways.

The Supreme Court in Birchfield expressly stated that nothing in the opinion should be read to cast doubt on the viability of implied consent statutes that impose civil or evidentiary penalties. Florida's Implied Consent Law imposes civil and evidentiary penalties. Nevertheless, appellant maintains Birchfield rendered the provision of Florida's Implied Consent Law at issue in this case unconstitutional. The Fourth District properly rejected such an argument and noted that if the Supreme Court intended to render implied consent laws like Florida's unconstitutional, "it would have said so." McGraw, 245 So. 3d at 770.

Appellant contends section 316.1932(c) creates "an irrevocable rule of implied consent." (IB. 11). However, appellant does not explain how citizens are precluded from revoking consent under the statute. The State maintains the statute

does not create "an irrevocable rule of implied consent" and that a motorist can avoid the consequences of the pertinent portion of section 316.1932(c) in myriad ways. Accordingly, the Fourth District's decision in this case should be affirmed.

ARGUMENT

THE COURT SHOULD ANSWER THE CERTIFIED QUESTION AFFIRMATIVELY BECAUSE APPELLANT CONSENTED TO THE BLOOD DRAW IN THIS CASE WHEN HE CHOSE TO DRIVE ON FLORIDA'S ROADWAYS.

Standard of Review

The proper standard of review is de novo. State v. Sigler, 967 So. 2d 835, 841 (Fla. 2007). However, there is a strong presumption in favor of the constitutionality of statutes and all doubt will be resolved in favor of the constitutionality of a statute. State v. Kinner, 398 So. 2d 1360, 1363 (Fla. 1981). Therefore, the Court must interpret section 316.1932(c) of the Florida Statutes with all doubts resolved in favor of holding it constitutional.

Jurisdiction

The Court should dismiss jurisdiction over this case because Florida law is crystal clear "that courts should not pass upon the constitutionality of statutes if the case in which the question arises may be effectively disposed of on other grounds." Singletary v. State, 322 So. 2d 551, 552 (Fla. 1975); Quince v. State, 241 So. 3d 58, 63 (Fla. 2018)(refusing to reach constitutional challenge raised by defendant

where case could be resolved on other grounds): Mounier v. State, 178 So. 2d 714, 715 (Fla. 1965)(refusing to pass on the constitutionality of a spearfishing statute because evidence in case clearly established the offenses at issue were not committed in Monroe County). The trial court denied appellant's motion to suppress and specifically found the good faith exception to the warrant requirement applied in this case. (R. 73-74). The Fourth District Court of Appeal unanimously agreed that the trial court's ruling should be affirmed under the good faith exception. McGraw, 245 So. 3d at 770, 777. Accordingly, the Court should dismiss review of this case because it can be resolved on other grounds. State v. Robbins, 863 So. 2d 168 (Fla. 2003)(dismissing review of case involving a certified question of great public importance).

Good Faith Exception

Contrary to the assertion made by the Amicus in this case, there is an exception "to the warrant requirement at play in this case other than McGraw's consent." (AB. 4). Appellant's motion to suppress was denied because the trial court applied the good faith exception to the warrant requirement. (R. 73). The trial court found that Officer DeSantis proceeded "in objectively reasonable reliance on the validity of the current statute" and that he had "a good faith belief in the constitutional validity of a warrantless blood draw authorized by section 316.1932(1)(c)" under the circumstances in this case. Id. The Fourth District

unanimously concluded that appellant's blood draw was permissible under the good faith exception. McGraw, 245 So. 3d at 770, 777. Appellant, however, contends that both the trial court and the Fourth District erroneously applied the good faith exception in this case.

The plain language of section 316.1932(1)(c) states "[a]ny person who is incapable of refusal by reason of unconsciousness or other mental or physical condition is deemed not to have withdrawn his or her consent to such test." Appellant was unconscious in the hospital after he crashed his vehicle. (R. 127-129). Thus, under the plain language of the law, appellant did not withdraw his consent to submit to the blood test conducted at Officer DeSantis's behest. § 316.1932(1)(c), Fla. Stat.

It is undisputed that section 316.1932(1)(c) had not been declared unconstitutional at the time appellant drove drunk, crashed his car, and sustained injuries that rendered him unconscious and unresponsive. Nevertheless, appellant argues that the good faith exception is inapplicable in this case because Officer DeSantis "should have known" that he could not rely on section 316.1932(1)(c) to draw appellant's blood due to the Fifth District's decisions in Williams v. State, 167 So. 3d 483 (Fla. 5th DCA 2015) and State v. Liles, 191 So. 3d 484 (Fla. 5th

DCA 2016). (IB. 50). Such an argument must fail because nothing in Williams or Liles[1] held that section 316.1932(1)(c) was unconstitutional.

Officer DeSantis is a police officer, not a member of the judiciary. His job involves the "enforcement of the penal, traffic, or highway laws of this state," not deciding which Florida laws are unconstitutional and cannot be followed. § 112.531(1), Fla. Stat. Appellant does not cite any authority holding that Officer DeSantis could deem the pertinent provisions of section 316.1932(1)(c) unconstitutional. Any such conduct on his part would violate the Florida Constitution's strict "separation of powers" doctrine. Thus, appellant's claim that Officer DeSantis should have ignored the plain language contained in a duly-enacted Florida statute that had not been declared unconstitutional by the judiciary must fail. Maison Grand Condo. Ass'n, Inc. v. Dorten, Inc., 600 So. 2d 463, 465 (Fla. 1992)(a statute is presumed to be valid and is given effect until it is judicially declared unconstitutional); Mallory v. State, 866 So. 2d 127, 128 (Fla. 4th DCA 2004).

[1] The State contends it would have been patently unreasonable to find that Officer DeSantis could have followed Liles because that opinion was issued only eight (8) days before appellant's crash. Furthermore, Liles is distinguishable because it involved defendants who initially refused to submit to a blood test but eventually complied when the police stated they would forcibly take the blood, if necessary. Finally, Liles supports the trial court's ruling because the Fifth District ultimately concluded that the forced blood draws were admissible under the good faith exception to the exclusionary rule.

Appellant contends Officer DeSantis should have ignored a valid Florida law, which had existed for nearly five decades, and taken it upon himself to interpret the Fifth District's decision in Williams as prohibiting conduct that was expressly permitted under Florida law. (IB. 49-50). Appellant's argument must fail because it overlooks the issue presented in Williams, i.e., "whether it is unconstitutional to punish a person criminally for refusing to submit to a breath-alcohol test when the officer conducting the test does not have an arrest warrant." Williams, 167 So. 3d at 485. The Fifth District held it was not unconstitutional to do so, and it did not conclude that any Florida law was unconstitutional. In fact, the court in Williams ultimately held that warrantless breath-alcohol tests were reasonable under the Fourth Amendment.

Appellant cites Carpenter v. State, 228 So. 3d 535 (Fla. 2017) to support his argument on this point. (IB. 47-50). The decision in Carpenter, however, favors the application of the good faith exception in this case. The pertinent language contained in section 316.1932(1)(c) of the Florida Statutes has existed in Florida law since the 1960s. § 322.261(1)(b), Fla. Stat. (1969). The Fifth District's decision in Williams, in contrast, was rendered less than a year before appellant's blood was drawn. This Court was actively reviewing the Fifth District's opinion in Williams when appellant's crash occurred, and the Court ultimately vacated the Fifth District's decision in Williams. Williams v. State, 2016 WL 6637817 (Fla.

Nov. 9, 2016). Officer DeSantis's actions were permissible under a well-established Florida law that was directly on point. He cannot be faulted for failing to follow inapplicable "new case law" from the Fifth District that was being reviewed by this Court. Carpenter, 228 So. 3d at 540-541.

Both the trial court and the Fourth District agreed that appellant's blood draw was permissible under the good faith exception. McGraw, 245 So. 3d at 770, 777. To paraphrase the Amicus, the lower courts "[s]ure got that right." (AB. 17). This Court should affirm the denial of appellant's motion to suppress because at the time of appellant's crash Officer DeSantis, in good faith, reasonably relied on a valid Florida statute that had not been declared unconstitutional. State v. Hoerle, 901 N.W.2d 327, 334 (Neb. 2017)(blood draw taken prior to Birchfield decision; good faith exception applied where officer acted in objectively reasonable reliance on a statute that had not been found unconstitutional at that time); Commonwealth v. Updike, 172 A.3d 621 (Pa. Super. Ct. 2017)(good faith exception applied to blood draw taken prior to Birchfield; no Fourth Amendment violation).

Certified Question

The Fourth District certified the following question to this Court as one of great public importance:

> Under the Fourth Amendment, may a warrantless blood draw of an unconscious person, incapable of giving actual consent, be pursuant to section 316.1932(1)(c), Florida Statutes (2016) ("Any person who is incapable of refusal by reason of unconsciousness or other mental or

> physical condition is deemed not to have withdrawn his or her consent to [a blood draw and testing].”), so that an unconscious defendant can be said to have “consented” to the blood draw?

McGraw, 245 So. 3d at 777-778. For the reasons set forth below, the Court should answer the certified question affirmatively.

1. Appellant Consented to the Blood Draw in this Case by Voluntarily Driving on Florida’s Roadways.

Alcohol consumption is the leading cause of traffic fatalities and injuries in the United States. Birchfield, 136 S. Ct. at 2178. To combat the scourge of drunk driving, all fifty States adopted some version of implied consent laws requiring motorists to submit to a breath/blood test if he is arrested for a drunk-driving offense. Id. at 2169 (quoting McNeely). Opinions from the United States Supreme Court have previously approved of the general concept of implied-consent laws that impose civil and evidentiary consequences on motorists who refused to comply with testing, and the Supreme Court expressly stated in Birchfield that “nothing we say here should be read to cast doubt on them [implied consent laws].” Id. at 2185. Nevertheless, appellant argues the decisions in Birchfield and McNeely eviscerated the provision of Florida’s Implied Consent Law at issue in this case. (IB. 11).

“The overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State.” Schmerber v. California, 384 U.S. 757, 767 (1969). Compelling a person to provide a blood

sample must be justified under the Fourth Amendment, which ordinarily requires a search warrant or the existence of one of the recognized exceptions to the warrant requirement. McNeely, 133 S. Ct. at 1558. Consent to a search is one of the specifically established exceptions to the warrant requirement. Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973). Appellant consented to the blood test in this case when he accepted the privilege of driving on Florida's roadways and signed a driver's license stating that operation of a motor vehicle constitutes consent to any sobriety test required by law. § 316.1932 (1)(c), Fla. Stat. Accordingly, the Fourth District properly held that the blood test in this case did not violate appellant's Fourth Amendment rights. McGraw, 245 So. 3d at 762.

The Supreme Court acknowledged that "sometimes consent to a search need not be express but may be fairly inferred from context." Birchfield, 136 S. Ct. at 2185. Appellant's consent to the blood draw in this case may be fairly inferred from context. Appellant chose to engage in the dangerous, and highly regulated, activity of driving a motor vehicle on Florida's roadways.[2] Miami Transit Co. v.

[2] Driving a motor vehicle is probably the most regulated activity that average Floridians engage in. A license is required to drive on Florida's roadways, and the vehicles driven must be insured. § 322.03(1), Fla. Stat.; § 324.022(1), Fla. Stat. Drivers must have knowledge of numerous "rules of the road" and are precluded from engaging in numerous activities while driving, i.e., driving while intoxicated, wearing headphones, texting while driving, etc. § 316.193, Fla. Stat.; § 316.304, Fla. Stat.; § 316.305, Fla. Stat. Drivers must utilize seat belts and very young

McLin, 133 So. 99, 102 (Fla. 1931)("The motor vehicle, when operated on public highways, being a dangerous instrumentality, the regulation of the use of such vehicles is a proper matter of police power inherent in the state."); State v. Burris, 875 So. 2d 408, 413 (Fla. 2004)(acknowledging automobiles have been held to be deadly weapons under certain criminal statutes). The Supreme Court has held that heavily regulated businesses and industries may be excepted from the warrant requirement. Marshall v. Barlows, Inc., 436 U.S. 307 (1978); New York v. Burger, 107 S. Ct. 2636 (1987).

The provision of Florida's Implied Consent Law at issue in this case is analogous to the situation in Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989). In Skinner, the Federal Railroad Administration created rules requiring blood and urine tests of employees involved in certain train accidents. The rules did not require a warrant or reasonable suspicion before the tests were conducted. The Supreme Court held the regulations requiring alcohol and drug testing were reasonable under the Fourth Amendment. Similarly, the portion of section 316.1932(1)(c) at issue in this case is reasonable under the Fourth

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children must be seated in a federally approved child restraint device. § 316.613, Fla. Stat.; § 316.614, Fla. Stat. Vehicles on the roadway must also contain mirrors, horns, windshields, and must comply with a multitude of other regulations. § 316.271, Fla. Stat.; § 316.294, Fla. Stat.; § 316.2952, Fla. Stat. The list of requirements for this highly regulated activity could go on and on.

Amendment because it only applies to drivers who (1) gave their implied consent to the blood draw by operating a vehicle on Florida's roadways, (2) appear for treatment at a hospital, clinic, etc., (3) police have reasonable cause to believe drove a motor vehicle under the influence of alcoholic beverages, and (4) are incapable of refusal by reason of unconsciousness or other mental or physical condition.

Appellant's argument on this point is flawed because consent has been implied where a person's voluntary conduct put him in a situation he knew, or should have known, would provide a legitimate reason to conduct a search. For example, a person gives implied consent to a search of his luggage if he engages in the regulated activity of bringing luggage on a commercial aircraft. United States v. Doran, 482 F.2d 929, 932 (9th Cir. 1973); Shapiro v. State, 390 So. 2d 344, 347 (Fla. 1980)(concluding "[o]ne who enters the boarding area of the airport knows or should know that he is subject to being searched for weapons" and therefore defendant impliedly consented to search). Consent to search can also be implied by other forms of voluntary conduct, like working at a prison or visiting a military base. Clark v. State, 395 So. 2d 525, 529 (Fla. 1981); Morgan v. United States, 323 F.3d 776, 778 (9th Cir. 2003). Appellant clearly knew, or should have known, that if his operation of a dangerous instrumentality on Florida's roadways while under the influence of alcohol rendered him unconscious and required treatment at

the hospital, then he would be subject to a blood draw. In fact, the Supreme Court observed decades ago that implying consent in a similar context would be "sensible and civilized," especially given "the hazards of the road due to drunken driving." Breithaupt v. Abram, 352 U.S. 432, 435 n.2 (1957).

Contrary to appellant's assertions, nothing in the plain language of section 316.1932(c) creates an "irrevocable rule of implied consent," nor is any person precluded from revoking consent. (IB. 33, 35). The Initial Brief fails to explain how an "irrevocable rule" is created by section 316.1932(c) or how citizens do not have the option to revoke consent under the statute. Id. A motorist can avoid the consequences of the pertinent portion of section 316.1932(c) in myriad ways, i.e., refraining from driving drunk on Florida's roadways, remaining conscious after endangering the public by consuming alcohol and driving, etc. Thus, appellant's claims on this front are without merit. Hyde, 393 P.3d at 968 (defendant has no constitutional right to refuse a blood-alcohol test); Skinner, 489 U.S. 602.

The State contends there is no basis to conclude that the implied consent given in this case was anything but voluntary. The State did not force appellant to drive on Florida's roadways. The record in this case shows that appellant enjoyed the privilege of driving on his own volition. Because appellant made the choice to drive on Florida's roadways, he was bound to abide by the rules and conditions

that come with enjoying that privilege, which includes consent to the blood draw under the circumstances presented here.

Appellant's reliance on People v. Arredondo, 199 Cal. Rptr. 3d 563 (Ct. App. 2016) is misplaced because that decision was superseded, review was granted by the Supreme Court of California, and the case remains pending before that court. People v. Arrendondo, 371 P.3d 240 (Cal. 2016); (IB. 32, 34). The decisions in State v. Romano, 800 S.E.2d 644 (N.C. 2017) and State v. Havatone, 389 P.3d 1251 (Ariz. 2017) are distinguishable because the statutes at issue in those cases did not require a defendant to appear at a hospital or other medical facility for treatment. The Supreme Court of Pennsylvania's decision in Commonwealth v. Myers, 164 A.3d 1162, 1164 (Pa. 2017) is inapposite because the implied consent statute involved in that case explicitly granted DUI arrestees the right to refuse chemical testing and there was no provision stating an unconscious driver is deemed not to revoke his consent to testing.

2. The Supreme Court in Birchfield Expressly Stated Nothing in the Opinion Should be Read to Cast Doubt on Florida's Implied Consent Law.

The Fourth District concluded that Birchfield meant exactly what it stated, i.e., nothing in the opinion should be read to cast doubt on the constitutionality of implied implied-consent laws that impose civil penalties and evidentiary consequences. McGraw, 245 So. 3d at 766. Florida's Implied Consent Law imposes civil penalties and the pertinent language in section 316.1932(c) has

existed for approximately five decades. The United States Supreme Court was obviously aware the majority of States have implied consent statutes with analogous provisions regarding unconscious drivers when it stated that nothing in Birchfield should be read to cast doubt on such statutes. Birchfield, 136 S. Ct. at 2185. The State submits that is why the Supreme Court noted that in a case where a driver it unconscious "the police may apply for a warrant ***if need be***." Id. (emphasis added). The "if need be" language acknowledges there are circumstances where the police would not need a warrant to obtain blood from an unconscious motorist, i.e., when state law provides such a driver has not revoked his consent to such testing.

The Fourth District's conclusion is supported by the decision in Hyde, which addressed a blood draw obtained from an unconscious driver. The Colorado Supreme Court thoroughly analyzed the issue and concluded "[b]y driving in Colorado, Hyde consented to the terms of the Expressed Consent Statute, including its requirement that he submit to blood-alcohol testing under the circumstances present here." Hyde, 393 P.3d at 969. The Supreme Court of Wisconsin recently reached a similar conclusion in State v. Mitchell, 914 N.W.2d 151 (Wis. 2018).[3] In Mitchell, the police obtained blood from an unconscious defendant at the hospital

[3] The State notes the defendant in Mitchell recently filed a petition for writ of certiorari with the United States Supreme Court.

pursuant to a state statute analogous to the one at issue in this case. The court held the blood draw did not violate the Fourth Amendment and concluded that the defendant "voluntarily consented to a blood draw by his conduct of driving on Wisconsin's roads and drinking to a point evidencing probable cause of intoxication. Further, through drinking to the point of unconsciousness, Mitchell forfeited all opportunity . . . to withdraw his consent previously given." Id. at 167. The Court should affirm the Fourth District's decision below based upon the well-reasoned decisions in Hyde and Mitchell. State v. Schuster, 2017 WL 2417815 (Ohio Ct. App. June 5, 2017)(police properly drew blood from defendant, who was incapable of refusal, in hospital pursuant to implied consent statute).

Appellant erroneously references the "United States Supreme Court's treatment" of Aviles v. State, 385 S.W.3d 110 (Tex. App. 2012) to support his argument. (IB. 38). In Aviles v. Texas, 134 S. Ct. 902 (2014), the United States Supreme Court simply granted certiorari over Aviles, vacated the state court opinion, and remanded for further consideration in light of McNeely. Such action "does not indicate, nor even suggest, that the lower court's decision was erroneous." Communities for Equity v. Michigan High School Athletic Ass'n, 459 F.3d 676, 680 (6th Cir. 2006). Appellant's reliance on the "United States Supreme Court's treatment" of Aviles is misplaced and the case is clearly inapposite. Aviles

v. State, 443 S.W.3d 291 (Tex. App. 2016)(statute required a blood draw for any DUI suspect who had two or more prior DUI arrests; statute was unconstitutional).

3. Appellant Consented to the Blood Draw by Driving on Florida's Roadways, Wrecking his Vehicle, Rendering Himself Unconscious, and Appearing at the Hospital for Treatment When there was Reasonable Cause for the Police to Believe he was Under the Influence of Alcoholic Beverages.

Appellant notes that the Fourth District's opinion in this case discussed Justice Eid's concurrence in Hyde. McGraw, 245 So. 3d at 768. Justice Eid wrote that driving on the roads in Colorado, or engaging in a highly regulated industry, are two contexts from which consent can be inferred. Hyde, 393 P.3d at 972 (Eid, J., concurring). Appellant states this Court should reject such an analysis and contends his "[w]aiver of a deeply personal constitutional right" cannot be based upon his decision to engage the highly regulated activity of driving on Florida's roadways. (IB. 40). Such an argument should be rejected because the courts have repeatedly held that consent to search can be inferred from checking a bag at an airport, entering a military base, or simply being employed at a prison or on a railroad. Doran, 482 F.2d at 932; Shapiro, 390 So. 2d at 347; Clark, 395 So. 2d at 529; Morgan, 323 F.3d at 778; Skinner, 489 U.S. 602. These cases all demonstrate that, contrary to appellant's assertion, consent may exist if a person knows an official intrusion into his privacy is contemplated if he does a certain thing and then proceeds to do that thing. (IB. 40).

Appellant claims, without citing any authority, that engaging in the highly regulated field of driving a dangerous instrumentality on Florida's roadways cannot be equated to firearms dealers and liquor distributors. (IB. 42). He does not, however, contend driving cannot be equated with checking a bag at an airport, visiting a military base, or working for a railroad. Nor does appellant explain why the narrowly-tailored provision in section 316.1932(c) at issue in this case cannot pass constitutional muster when the United States Supreme Court previously upheld a broader regulation that required a blood test, without reasonable suspicion, in Skinner.

Appellant claims "dire and unintended consequences" may occur if statutes like section 316.1932(c) are upheld. (IB. 42). Appellant also cites Arredondo[4] and suggests a "parade of horribles" could result from the existence of such laws. Id. Appellant's fears are unfounded and ignore the fact that implied consent laws have existed in America for over sixty years, and the specific language at issue in this case has been on the books in Florida for approximately 50 years. Birchfield, 136 S. Ct. 2169; § 322.261(1)(b), Fla. Stat. (1969). Even though these laws have existed for quite some time, the Fourth Amendment has not been "left in tatters."

[4] Again, the State notes the Arredondo case appellant relies on was vacated and is currently pending before the Supreme Court of California.

(IB. 42). Thus, appellant's speculative fears are baseless and the Court should affirm the Fourth District's decision in this case.

CONCLUSION

Based on the foregoing, the State respectfully requests this Honorable Court affirm the Fourth District's opinion in McGraw because (1) it properly upheld the constitutionality of section 316.1932(1)(c) of the Florida Statutes, and (2) it concluded the results of appellant's blood draw were admissible under the good faith exception to the warrant requirement.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished via email (appeals@pd15.org and beisenberg@pd15.state.fl.us) to Benjamin Eisenberg, Assistant Public Defender, 421 Third Street, West Palm Beach, FL 33401 on October 18, 2018.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief has been prepared with Times New Roman 14 point type and complies with the font requirements of Rule 9.210.

/s/ Richard Valuntas
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