IN THE SUPREME COURT OF FLORIDA

WILLIAM WILLIAMS,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.
_____/

CASE NO.: SC15-1417

L.T. CASE NO(S).:
5D14-3543;
13-314873-MMDB

AMICUS BRIEF IN SUPPORT OF RESPONDENT, BY THE FLORIDA POLICE CHIEF'S ASSOCIATION

LEONARD J. DIETZEN
FLORIDA BAR NO.: 0840912
E-MAIL: LDIETZEN@RUMBERGER.COM
J. DAVID MARSEY
FLORIDA BAR NO.: 0010212
E-MAIL: DMARSEY@RUMBERGER.COM
Rumberger, Kirk, & Caldwell, P.A.
A PROFESSIONAL ASSOCIATION
215 SOUTH MONROE STREET
SUITE 702
TALLAHASSEE, FLORIDA 32301
TEL: 850.222.6550
FAX: 850.222.8783
ATTORNEYS FOR THE FLORIDA POLICE CHIEFS ASSOCIATION

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES

STATEMENT OF IDENTITIES OF AMICUS PARTIES AND THEIR INTEREST IN THE CASE

Pursuant to Florida Rule of Appellate Procedure 9.370(b), amicus curiae party, the Florida Police Chiefs Association, provides this statement identifying itself and its interest in the case.

The Florida Police Chief's Association was founded in 1952 and is now composed of more than 750 of the state's top law enforcement executives, and has members representing every region of the state. The Association promotes legislation that would enhance public safety by providing superior police protection for the residents of Florida and its many visitors, and provides communication, education and training for the state's various police and security agencies.

The issue is significant to the Association and it supports the Respondent State of Florida and the constitutionality of the aforementioned statute. The Association submits that its amicus brief would assist the Court in resolving the weighty issues before it and that its participation would be valuable to the Court given the significant breadth and scope of the future effects of the Court's decision on the issues raised.

SUMMARY OF THE ARGUMENT

Amicus curiae, representing hundreds of Florida's law enforcement executives throughout the state, urge the Court to affirm the holding of the Fifth District Court of Appeal in this case.

Petitioner mistakenly relies on an overly-narrow interpretation of the Fourth Amendment to the United States Constitution, the *per se* unreasonableness doctrine for warrantless searches and overlooks the fundamental essence of Fourth Amendment analysis, its reasonableness component and the basis for the lower court's holding: the balancing of government interests and the rights of the accused. In doing so, Petitioner fails to acknowledge the so-called "general reasonableness" exception to the warrant requirement previously recognized by the United States Supreme Court and erroneously attributes its existence to the lower court in this case.

Furthermore, the Florida Police Chiefs Association adopts in its entirety the Respondent, State of Florida's, arguments in support of the constitutional application of Section 316.1939, Florida Statutes to Petitioner.

ARGUMENT

I. There is no Constitutional Impediment to a Government Imposed Choice that Has the Effect of Discouraging the Exercise of a Constitutional Right

The Association concedes that the Government cannot criminalize the exercise of a constitutional right. *See generally, Koontz v. St. Johns Water Mgmt. Dist.,* ___U.S.___, 133 S. Ct. 2586, 2594 (2013) (the "unconstitutional conditions" doctrine vindicates constitutional rights by preventing the government from coercing people into giving them up). However, the Constitution does not prohibit "every government-imposed choice in the criminal process that has the effect of discouraging the exercise of constitutional rights." *Jenkins v. Anderson*, 447 U.S. 231, 236 (1980) (internal quotations omitted). Therefore, even if a right to refuse a breath test exists – which the Association expressly denies – the requirement to provide a breath test is not constitutionally impermissible where a motorist: (1) is provided prior notice of the requirement to provide a breath test if arrested for DUI; (2) choses to exercise his privilege (not a right) to operate a vehicle; (3) after consuming alcoholic beverages or substances; (4) to the extent that a law enforcement officer would have probable cause to arrest for driving while impaired and/or driving with an unlawful blood alcohol level; (5) engaging in some conduct sufficient to result in an interaction with law enforcement; and (6) being arrested for DUI. Moreover, as more fully set forth below and in the State's Answer Brief,

where, as here, there is no constitutional right to refuse to provide a breath sample following a lawful arrest, the unconstitutional conditions doctrine is inapplicable. Stated another way, Section 316.1939, Florida Statutes, was constitutionally applied to Petitioner because he did not have the constitutional right to refuse to provide a breath sample.

II. The Lower Court's Recognition of the Pre-Existing and Inherent General Reasonableness Exception to the Warrant Requirement is Lawful

Petitioner argues that Section 316.1939, Florida Statutes was unconstitutionally applied to him because: (1) *Missouri v. McNeely,* ___U.S. ___, 133 S. Ct. 1552 (2013), rejects any exception to the warrant requirement in "routine" DUI cases *other than* exigent circumstances, and (2) absent a search warrant or exigent circumstances, the attempted search to obtain his breath sample was *per se* unconstitutional, and therefore, he had the right to refuse it. He is mistaken on both counts. Petitioner's argument fails to address head on the lower court's substantive analysis. Instead, he erroneously relies on general constitutional provisions, an overly-narrow view of Fourth Amendment precedent and fails to apprehend the import of *Maryland v. King*, upon which the lower court relied. *Maryland v. King*, ___ U.S. ___, 133 S.Ct. 1958 (2013).

A. *McNeely* is Distinguishable, and Therefore, is not Controlling

Petitioner's reliance on *McNeely* as an outright bar to warrantless, compelled breath tests is misplaced for two important reasons: (1) *McNeely* is inapposite because the challenged search in that case was the withdrawal of a blood, not breath sample; and (2) *McNeely* itself rejects the notion of a *per se* rule or reasonableness – and by logical extension, unreasonableness – in favor of the tried but true case-by-case factual analysis.

In *Skinner v. Railway Labor Executive's Association*, 489 U.S. 602 (1989), the highest court in the land expressly distinguished between the privacy interests of compelled blood samples and the reduced privacy interest in a compelled breath sample. The Court aptly summarized:

> The breath tests authorized by [the challenged law] are even less intrusive than the blood tests. . . [W]e cannot conclude that the administration of a breath test implicates significant privacy concerns.

Although Petitioner attempts to label *McNeely* and his case as "routine DUI" investigations, they are far from identical because of the substantially different levels of intrusion into the accused's privacy interests. Thus, as more fully set forth in Section II(B) below, and as recognized by the lower court, the diminished expectation of privacy is a relevant and material component of the Fourth Amendment balancing equation. This critical distinction precludes application of *McNeely's* binding effect.

Petitioner's suggestion that *McNeely* held that exigent circumstances was the "only applicable exception" to the warrantless search requirements is curious. As in any case, the breadth and scope of a court's analysis is governed by the arguments presented to it, and *McNeely* was no different. In that case, the State "contend[ed] that whenever an officer has probable cause to believe an individual has been driving under the influence of alcohol, exigent circumstances will necessarily exist because BAC evidence is inherently evanescent." *McNeely*, 133 S. Ct. at 1560. In rejecting the *per se* rule sought by the State and its *amici*, the Court retained the "careful case-by-case assessment of exigency." *Id*. At 1561. Notably absent from the Court's analysis – and apparently not argued by the parties – is the balancing between the diminished expectation of privacy of those lawfully arrested for DUI and the minimal intrusion resulting from a compelled breath test. At its very core, a Fourth Amendment analysis and the determination of the reasonableness of a given search compel the balancing between the government's interests and the individual's rights. "What is reasonable of course depends on all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself." *Skinner*, 489 U.S. at 619 (internal quotations omitted); *United States v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985). "Thus, the permissibility of a particular practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of

legitimate, governmental interests." *Skinner*, 489 U.S. at 619; *Delaware v. Prouse*, 440 U.S. 648, 654 (1979). Instead of attacking the lower court's balancing of the interests or offering his own, Petitioner relies on broad constitutional platitudes to render a compelled breath test unreasonable, thereby precluding the criminalization of his refusal to provide one. His arguments are not persuasive.

B. The Balancing of the State's Interests and Petitioner's Interests Renders the Requirement to Provide a Breath Test Objectively Reasonable

Petitioner argues that all compelled searches in "routine" DUI cases, absent a warrant or exigent circumstances are per se unconstitutional, and therefore, Section 316.1939, Florida Statutes criminal penalties were unconstitutionally applied to him. Petitioner's general propositions of law lacks the necessary, careful case-by-case analysis required to reach the issue or to refute the lower court's well-reasoned rationale. *See Skinner*, 489 U.S. at 619; *Delaware v. Prouse*, 440 U.S. 648, 654 (1979). Petitioner's suggestion that the compelled search in this case was *per se* unreasonable ignores the balancing required of all Fourth Amendment analyses. "[T]he ultimate measure of constitutionality of a governmental search is 'reasonableness.'" *King*, 133 S.Ct. at 1969. Where a court determines no warrant is required, it merely acknowledges:

> [R]ather than employing a *per se* rule of unreasonableness, we balance the privacy- related and law enforcement-related concerns to determine if the intrusion was reasonable. This application of traditional standards of reasonableness requires a court to weigh the

> promotion of legitimate governmental interests against the degree to which the search intrudes upon an individual's privacy.

King, 133 S.Ct. at 1970 (internal quotations and citations omitted). When viewed through the proper prism, the lower court has not created a new exception to the warrant requirement, but rather has merely conducted the required balancing test and properly applied the objective reasonableness standard.

Here, the lower court conducted a thorough analysis, evaluating: (1) the State's interests in decreasing and prosecuting impaired driving; (2) the minimally intrusive breath testing procedure; and (3) Petitioner's reduced expectation of privacy. More specifically, Petitioner's expectation pf privacy was diminished because: (1) he was driving on a public road; (2) Florida's implied consent provision provided prior notice of the breath testing requirement if arrested for DUI;[1] and (3) his custodial arrest. *Williams v. State*, 167 So. 3d 483, 494 (Fla. 5th DCA 2015).

Petitioner erroneously – but quite artfully[2] – attempts to equate the "general reasonableness" exception to the highly litigated "special needs" exception, however the comparison fails. The issues are clearly dissimilar and absolutely not

[1] For the purposes of this argument only, the Court was careful to distinguish Florida's implied consent law as providing prior notice and not constituting a constitutionally sufficient waiver.

[2] A rose by any other name would smell as sweet. *See Petitioner's Initial Brief, p.8.*

even close to "identical." *See Petitioner's Initial Brief, p. 8.* The distinction is more fully set forth in *King*, as that court summarizes:

> In some circumstances such as when faced with special law enforcement needs, diminished expectations of privacy, minimal intrusions **or the like**, the court has found that certain general, or individual circumstances may render a warrantless search or seizure reasonable.

King, 133 S.Ct at 1969 (emphasis added). Therefore, the "special needs" exception is separate and distinct, thus inapplicable to, the lower court's analysis of Petitioner's expectation of privacy and the intrusiveness of the breath test.

Petitioner has failed to rebut or distinguish the lower court's rationale, and therefore, his as-applied challenge to the constitutionality of Section 316.1939, Florida Statutes, should be rejected.

III. Florida Statutes Section 316.1939 was Constitutionally Applied to Petitioner

The Association fully endorses, adopts and incorporates herein the Respondent's Answer Brief.

CONCLUSION

The Florida Legislature has determined that those who repeatedly refuse to provide breath samples after being lawfully arrested upon probable cause should be exposed to additional criminal sanctions. The Firth Circuit appropriately and carefully weighed the State's interests, the minimal invasion involving a compelled breath test and Petitioner's diminished expectation of privacy. After the balancing test – which is compelled by United States Supreme Court precedent – the Court determined that under the totality of circumstances, the search was reasonable, and therefore, complied with the Fourth Amendment to the United States Constitution.

The Fifth District Court did not err when it weighed the relevant factors and determined that there was no valid constitutional right to refuse testing after Petitioner was lawfully arrested for DUI and requested to provide a breath sample. Petitioner has failed to persuasively argue against the Fifth District's rationale. Indeed, he has not even challenged its substantive analysis, instead, he relies on the ten thousand foot view and general constitutional concepts in lieu of the careful case-by-case analysis required by controlling law. Because Petitioner did not have a constitutional right to avoid producing a breath sample under the circumstances present here, the application of Florida's refusal statute did not criminalize his exercise of a constitutional right, and therefore, was constitutionally applied to him.

The Florida Police Chief Association urges this Court to find the refusal statute was constitutionally applied to Petitioner and to affirm the decision of the Fifth District Court.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by e-mail to Aaron D. Delgado, Esquire at adelgado@communitylawfirm.com, Eric A. Latinsky, Esquire at elatinsky@communitylawfirm.com and Robert W. Rawlins, Esquire at rrawlins@communitylawfirm.com (Counsel for Petitioner), Kristen Davenport, Esquire, at kristen.davenport@myfloridalegal.com (Counsel for Respondent), Tracey Wood, Esquire, at tracey@traceywood.com (Counsel for Amici Curiae National College for DUI Defense), Sonya Rudenstine, Esquire at srudenstine@yahoo.com and Karen Gottlieb, Esquire at kgottlie@fiu.edu (Counsel for Amici Curiae FACDL), and Ben Fox, Esquire at BrevCtyCourtAppealts@sa18.org and Arthur I. Jacobs, Esquire, at jacobsscholzlaw@comcast.net (Counsel for Amici Curiae FPAA) this 18th day of April, 2016.

/s/ J. David Marsey
LEONARD J. DIETZEN,
Florida Bar No.: 0840912
E-MAIL: ldietzen@rumberger.com
J. DAVID MARSEY
Florida Bar No.: 0010212
E-MAIL: dmarsey@rumberger.com
Rumberger, Kirk, & Caldwell, P.A.
215 South Monroe Street, Suite 702
Tallahassee, Florida 32301
Tel: 850.222.6550
Fax: 850.222.8783
Attorneys For Amicus Curiae Florida
Police Chiefs Association

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief has been typed using the Times New Roman 14-point font, and therefore complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

/s/ J. David Marsey
LEONARD J. DIETZEN
Florida Bar No.: 0840912
E-Mail: ldietzen@Rumberger.Com
J. DAVID MARSEY
Florida Bar No.: 0010212
E-Mail: dmarsey@Rumberger.Com
Rumberger, Kirk, & Caldwell, P.A.
215 South Monroe Street
Suite 702
Tallahassee, Florida 32301
Tel: 850.222.6550
Fax: 850.222.8783
Attorneys For Amicus Curiae Florida
Police Chiefs Association