IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT, IN AND FOR ORANGE COUNTY, FLORIDA

KEVIN BEARY, SHERIFF OF ORANGE COUNTY, FORIDA

Petitioner,

CASE NO.: 2006-CA-10404-O
WRIT NO.: 06-89

v.

STATE OF FLORIDA, et al.,

Respondents.

_____/

Petition for Writ of Certiorari or Prohibition

Ann-Marie Delahunty, Esquire
Assistant General Counsel, Orange County Sheriff's Office
for Petitioner.

Greg A. Tynan, Assistant State Attorney
for Respondent, State of Florida.

Stuart I. Hyman, Esquire
Stuart I. Hyman, P.A.
for Respondents.

Joerg A. Jaeger, Esquire
Jaeger & Blankner
for Respondents.

Matthew Leibert, Esquire
for Respondents.

Before MIHOK, LATIMORE, and COHEN, J.J.

PER CURIAM.

FINAL ORDER GRANTING PETITION FOR WRIT OF CERTIORARI

Kevin Beary, Sheriff of Orange County, Florida ("Petitioner"), petitions this Court for a Writ of Prohibition, or in the alternative, a Writ of Certiorari, from the imposition of an en banc[1] order of the county court entered on November 27, 2006, in twenty-nine (29)[2] separate DUI cases. Since the entry of the county court's order, the State reached a stipulation with defendants in five cases[3] and they are no longer subject to the order or the current petition. This Court has jurisdiction pursuant to rules 9.030(c)(3) and 9.100, Florida Rules of Appellate Procedure.

Facts and Procedural Background

On September 13 and 14, 2006, the State and the defendants consolidated into a single en banc hearing numerous Motions to Produce and Motions to Inspect that were pending in divisions of the County Court of Orange County. Among other items not subject to this petition, the defense sought production and inspection of each Intoxilyzer 8000 machine that the various defendants had been tested on in an attempt to show that the machines had been modified. The State and defense entered numerous documents into evidence and the State called three witnesses to testify, including Kelly Melville, an employee of the Orange County Sheriff's Office.

The en banc panel of the county court found evidence that questioned the reliability and accuracy of the Intoxilyzer 8000. Additionally, although the State argued

[1] The en banc panel consisted of county court judges: W. Michael Miller; Faye L. Allen; Deborah B. Ansbro; C. Jeffrey Arnold; John E. Jordan; and Mark D. Wixtrom.

[2] 2006-CT-008374-O; 2006-CT-005767-O; 2006-CT-007956; 2006-CT-008131-O; 2006-CT-008132-O; 2006-CT-001454-W; 2006-CT-001540-W; 2006-CT-005798-O; 2006-CT-009967-O; 2006-CT-005460-O; 2006-CT-007416-O; 2006-CT-011882-O; 2006-CT-012355-O; 2006-CT-010907-O; 2006-CT-001383-E; 2006-CT-012085-O; 2006-CT-011146-O; 2006-CT-008169-O; 2006-CT-011884-O; 2006-CT-007752-O; 2006-CT-004627-O; 2006-CT-007123-O; 2006-CT-006923-O; 2005-CT-009612-O; 2006-CT-005294-O; 2006-CT-000743-E; 2006-CT-006494-E; and 2006-CT-006748-O.

[3] 2005-CT-009612-O; 2006-CT-5294-O; 2006-CT-000743-E; 2006-CT-006494-E; 2006-CT-006748-O.

that the Orange County machines were the personal property of the Petitioner, the county court held that the Office of the State Attorney was in constructive possession of the Intoxilyzer 8000 machines. Finally, the county court ordered the production one of the Petitioner's Intoxilyzer 8000 machines for inspection by the defense. Petitioner seeks relief from the county court's order that it produce for inspection one of its Intoxilyzer 8000 machines.

Standing

The Petitioner is not a party to the underlying criminal cases. *Jenne v. Ammons*, 956 So. 2d 1291, 1292 (Fla. 4th DCA 2007) ("We conclude that the trial court order irreparably injures the petitioner and leaves the [Sheriff's office] with no remedy on appeal as the sheriff's office 'is not a party to the [underlying] criminal case.'") (*quoting Armor Correctional Health Serv. Inc. v. Ault*, 942 So. 2d 976, 977 (Fla. 4th DCA 2006)). Thus, the first question to be answered is whether the Petitioner has standing to seek relief from an order of a lower court with respect to a case in which he is not a party. The Fifth District Court of Appeal, in *Department of Corrections v. Harrison*, 896 So. 2d 868, 869-70 (Fla. 5th DCA 2005), held that the Department had standing to seek certiorari review of a lower court's order requiring the Department to pay for an interpreter during a defendant's sex offender treatment because "although the Department was not a party to the criminal case below, its non-party status deprived it of an adequate remedy by direct appeal." Similarly, in *Bradshaw v. Sandler*, 955 So. 2d 1219, 1220-21 (Fla. 4th DCA 2007), the Fourth District Court of Appeal addressed a situation where the Palm Beach County Sheriff had been ordered by a criminal trial court to transport an inmate of the county jail to the inmate's personal dentist.

> While certiorari relief is appropriate in "very limited circumstances," such relief is proper where "the order departs from the essential requirements of law and leaves the party with no adequate remedy by final appeal." In this particular situation, the Sheriff has no adequate remedy by final appeal. Because Sandler must pay the costs of security, the Sheriff's injury is not the monetary obligation of transporting Sandler, but simply the requirement to transport Sandler outside the jail. Once the Sheriff complies with the order, Sandler cannot be "untransported." The harm is complete upon the doing of the act; as such, this Court has jurisdiction to redress the claim of error.

Bradshaw, 955 So. 2d at 1220-1221 (citations omitted). Therefore, Petitioner has standing to seek relief in this Court.

Discussion

Petitioner argues that the Intoxilyzer 8000 is his personal property. Thus, as a separate constitutional officer and not a party to the underlying cases, Petitioner argues that the county court did not have jurisdiction over him. Petitioner rightly admits that the county court does have jurisdiction over evidence pertaining to the underlying cases and that the Office of the State Attorney is in constructive possession of that evidence if it is in the possession of a law enforcement agency because the agency holds the evidence in *custodia legis*. *See Almeda v. State*, 959 So. 2d 806, 808 (Fla. 2d DCA 2007) ("'A trial court's jurisdiction over a criminal proceeding includes inherent authority over property seized or obtained in connection with the proceeding and thus held in *custodia legis*.'") (*quoting Stevens v. State*, 929 So. 2d 1197, 1198 (Fla. 2d DCA 2006)). However, Petitioner argues that the Intoxilyzer is not evidence. Rather, according to Petitioner, rule 3.220(b)(1)(J), Florida Rules of Criminal Procedure, states that only the *results* of tests performed on the Intoxilyzer 8000 are evidence. Thus, Petitioner asserts that the Office

of the State Attorney is only in constructive possession of the *results* of those tests and not of the actual instrument.

Petitioner argues that the order requiring him to turn over one of his Intoxilyzer 8000's for inspection, dismantling, and photographing violates the Separation of Powers clause in Article II, Section 3, of the Constitution of the State of Florida by interfering with the discretionary function of an executive branch official; specifically section 30.53, Florida Statutes, which establishes the independence of sheriffs concerning the purchase of supplies and equipment. Additionally, Petitioner argues that even if there is no violation of the Separation of Powers clause, the order of the county court violated his due process rights because it directly affected his interest in his personal property, he did not receive real notice or an opportunity to be heard, and because he was not a party to the underlying cases the lower court lacked personal jurisdiction over him.

The State of Florida, through the Office of the State Attorney ("State"), agrees that the Petitioner's due process rights were violated by the order of the county court because: he is a separate constitutional officer; the Intoxilyzer 8000 is the personal property of Petitioner; he has an interest in that property; he did not receive notice of the hearing; and the county court lacked personal jurisdiction over him.

The defendants ("Respondents") still subject to this petition argue that the record failed to establish that the Intoxilyzer 8000 machine was owned by Petitioner. Furthermore, Respondents argue that regardless of whether the machine is owned by Petitioner, he has allowed the machine to be inspected by the Florida Department of Law Enforcement on an annual basis and allowed the results of the tests performed on the machine to be used as evidence in criminal trials against persons suspected of driving

under the influence, and, therefore, Petitioner has waived and property or privacy interest in the machine. Respondents, however, do not rely on any case law support for this proposition.

Additionally, Respondents argue that Petitioner was provided notice and an opportunity to be heard because Kelly Melville, the Agency Inspector for the Orange County Sheriff's Department, testified for the State in the en banc hearing. Again, Respondents fail to cite to any statutory or case law support for the proposition that the State's calling an employee of the Petitioner to testify at the hearing provided Petitioner with notice or a real opportunity to be heard.

Respondents rely on *A.L.H. v. State*, 773 So. 2d 1192 (Fla. 4th DCA 2000) for the proposition that the State is in constructive possession of evidence held or withheld by law enforcement agencies. The Petitioner does not dispute that proposition, but argues that only the *results* produced by the machine constitute *evidence*. However, Respondents, relying on *Houser v. State*, 474 So. 2d 1193 (Fla. 1985), *State v. Muldowney*, 871 So. 2d 911, 913 (Fla. 5th DCA 2004), and *Cloe v. State*, 613 So. 2d 70 (Fla. 4th DCA 1993), argue that the Intoxilyzer 8000 "machine itself constitutes evidence," and "Respondents are entitled to discovery of it." (Resp't Resp. 9.) Nonetheless, because we find that Petitioner did not receive notice or an opportunity to be heard, and because the lower court lacked personal jurisdiction over Petitioner we need not reach the other issues presented.

The Fifth District Court of Appeal has recognized that:

> "Criminal jurisdiction involves concepts of subject matter jurisdiction and personal jurisdiction . . . . Subject matter jurisdiction encompasses those matters upon which a court has the power to act, and refers to a court's authority to

> determine a particular kind of case, not merely the particular case then occupying the court's attention, while personal jurisdiction deals with the authority of a court to bind the *parties* to an action."

Stapler v. State, 939 So. 2d 1092, 1094 fn. 2 (Fla. 5th DCA 2006) (quoting 21 Am. Jur. 2d *Criminal Law* § 480 (1980)) (emphasis added). "If a court lacks personal jurisdiction over a party, then it lacks all jurisdiction to adjudicate a party's rights, whether or not the subject matter is properly before it." 21 Am. Jur. 2d *Criminal Law* § 480 (2007).

In *Davis v. State*, 928 So. 2d 442, 448 (Fla. 5th DCA 2006), the Fifth District Court of Appeal also held that:

> [C]ourts have personal jurisdiction over residents of Florida and *when reached by summons*, they become subject to the orders and decrees of the court. Courts having criminal jurisdiction may issue writs and process necessary to the exercise of criminal jurisdiction and the writs and processes shall have effect through the state.

(citations omitted; emphasis added.) Here, a civilian employee of Petitioner, Kelly Melville, the agency's breath test operator and inspector, was summoned to testify by the State. Ms. Melville testified that the Intoxilyzer 8000 is owned by Petitioner and that she only became the agency inspector as of March 24, 2006, less than a year prior to the hearing. The testimony elicited by the State from Ms. Melville concerned various documents, test tickets, and records that Respondents were seeking in their Motions to Produce as well as specific problems with two of the Orange County Sheriff's Office Intoxilyzer 8000 machines. Respondents elicited testimony from Ms. Melville concerning her education, training and experience, the number of machines in Petitioner's possession, field notes, and various inspections performed on machines that did not appear to be working properly.

Respondents argue that Petitioner was provided procedural due process by the State calling Ms. Melville to testify, and, therefore, Petitioner "chose to appear by [Ms. Melville] as opposed to counsel below" and "waived any right to claim that he was not properly notified." (Resp't Resp. 11.) However, "[r]epresentations by an attorney for one of the parties regarding the facts . . . do not constitute evidence." *Eight Hundred, Inc. v. Fla. Dept't. of Revenue*, 837 So. 2d 574, 576 (Fla. 1st DCA 2003). In the present case there is simply no evidence that Petitioner "chose" to be heard through Kelly Melville, nor is there any evidence that Petitioner received actual notice of the hearing. Certainly, there is a lack of any evidence that Petitioner was served with process. Furthermore, Respondents fail to cite to any case law for the proposition that the summoning of an employee of Petitioner is sufficient to provide the trial court personal jurisdiction over him.

> It is the duty of counsel to prepare appellate briefs so as to acquaint the Court with the material facts, the points of law involved, and the legal arguments supporting the positions of the respective parties. When points, positions, facts and *supporting authorities* are omitted from the brief, a court is entitled to believe that such are waived, abandoned, or deemed by counsel to be unworthy. Again, it is not the function of the Court to rebrief an appeal.

Polyglycoat Corp. v. Hirsch Distributors, Inc., 442 So. 2d 958, 960 (Fla. 4th DCA 1984) (emphasis added).

In *Metropolitan Dade County v. Curry*, 632 So. 2d 667, 668 (Fla. 3d DCA 1994), the Third District Court of Appeal held:

> Dade County was in possession of an automobile which had been impounded as a result of the arrest by Dade County law enforcement, of its driver, Isaac Curry. Upon completion of the criminal action the trial court entered an Oder for Return of Personal Property directing [Dade

> County] to return the vehicle to Curry. Dade County was not a party to nor was it notified of the hearing at which the trial court issued the disputed order. Some seventeen months later Dade County filed a Motion to Set Aside an Order for Return of Property, which was denied by the trial court.
>
> An order entered without notice or opportunity to be heard is a void order. *See Malone v. Meres*, 109 So. 677 (1926); *Falkner v. Amerifirst Federal Savings and Loan*, 489 So. 2d 758 (Fla. 3d DCA 1986). A void order may be attacked at any time. *See Shields v. Flinn*, 528 So. 2d 967 (Fla. 3d DCA 1988).
>
> As a matter of law the trial court was obligated to grant Dade County relief from the Order for Return of Personal Property. *The facts demonstrate that Dade County did not receive notice of the hearing on the Motion for Return of Property or an opportunity to be heard on said motion.*

(emphasis added.) The present controversy is somewhat distinguished from *Curry* because the property ordered produced here is the Petitioner's personal property. While Respondents assert that "[t]here was nothing in the record to establish that the breath testing machine to be produced was owned by the Sheriff of Orange County, Kevin Beary," the uncontested testimony in hearing below proves otherwise. (Resp't Resp. 1.) Laura Barfield, the program manager of the Alcohol Testing Program for the Florida Department of Law Enforcement, testified in response to various questions posed by the State that the Intoxilyzer 8000's at issue were *owned* by the Orange County Sheriff's Office. Additionally, Kelly Melville testified that the Intoxilyzer 8000's at issue were *owned* and operated by the Orange County Sheriff's Office.

In another analogous case, the Florida Supreme Court recently quashed an opinion of the Third District Court of Appeal directing a trial court to order a county

sheriff to arrange transport for a civilly committed client to another facility. *Everette v. Florida Dep't of Children and Families*, 961 So. 2d 270, 272-273 (Fla. 2007).

> In the decision below, the Third District held that the sheriff is responsible for the transportation of Everette and all those similarly situated, but the sheriff was not joined as a party to the proceedings. It is a longstanding principle of Florida law that "[a]ll persons materially interested in the subject matter of a suit and who would be directly affected by an adjudication of the controversy are necessary parties." *W.F.S. Co. v. Anniston Nat'l Bank of Anniston, Ala.*, 191 So. 300, 301 (1939). Necessary parties must be made parties in a legal action. *See Oakland Properties Corp. v. Hogan*, 117 So. 846 (1928). The decision of the district court below obligates the sheriff to coordinate and fund the transportation of all persons placed in a secure facility following the dismissal of criminal charges against them. This decision could produce a substantial strain on the resources of the sheriffs in Florida. Therefore, the sheriff was a materially interested necessary party to the proceedings below, and the district court erred in failing to provide the sheriff notice and an opportunity to be heard before deciding that the sheriff was responsible for Everette's transportation. Therefore, we quash the decision of the Third District below and remand for further proceedings.

Everette, 961 So. 2d at 273. Similarly, the order of the lower court here could affect the material interests of Petitioner in his personal property and, therefore, he was entitled to notice and a real opportunity to be heard. Thus, the order requiring Petitioner to produce one of his Intoxilyzer 8000's for dismantling, inspection, and photographing is void because Petitioner was not a party to the underlying cases, did not receive notice of the hearing or an opportunity to be heard, and because the lower court did not obtain personal jurisdiction over him. If the lower court seeks to gain personal jurisdiction over Petitioner, one of the parties to the underlying cases, most likely the defense, must summon the Petitioner and he should be provided a real opportunity to be heard.

Based on the foregoing, it is hereby **ORDERED AND ADJUDGED** that Kevin Beary's Petition for Writ of Certiorari is **GRANTED**.

1. The order of the lower court requiring Beary to produce one of his Intoxilyzer 8000's for inspection, dismantling, and photographing is quashed.

2. This order shall be included in the record of each underlying case.

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida, this __24__ day of _____October_____, 2007.

___/S/_____
A. THOMAS MIHOK
Circuit Court Judge

_/S/_____
ALICIA L. LATIMORE
Circuit Court Judge

__/S/_____
JAY PAUL COHEN
Circuit Court Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via U.S. mail to the **Honorable W. Michael Miller**, County Court Judge, 425 N. Orange Avenue, Orlando, FL 32801; the **Honorable Faye L. Allen**, County Court Judge, 425 N. Orange Avenue, Orlando, FL 32801; the **Honorable Deborah B. Ansbro**, County Court Judge, 425 N. Orange Avenue, Orlando, FL 32801; the **Honorable C. Jeffery Arnold**, Circuit Court Judge, 425 N. Orange Avenue, Orlando, FL 32801; the **Honorable John E. Jordan**, County Court Judge, 425 N. Orange Avenue, Orlando, FL 32801; the **Honorable Mark D. Wixtrom**, County Court Judge, 425 N. Orange Avenue, Orlando, FL 32801; **Ann-Marie Delahunty**, Assistant General Counsel, Orange County Sheriff's Office, 2500 W. Colonial Drive, Orlando, FL 32804; **Greg A. Tynan**, Assistant State Attorney, 415 N. Orange Ave., Orlando, FL 32801; **Stuart I. Hyman**, Esq., 1520 E. Amelia St., Orlando, FL. 32803; **Matthew Leibert**, Esq., 112 E. Concord St., Orlando, FL 32801; and **Joerg F. Jaeger**, Esq., 217 E. Ivanhoe Blvd., North, Orlando, FL 32804, on this ___24___ day of _____October_____, 2007.

_____/S/_____
Judicial Assistant