NOT FINAL UNTIL TIME EXPIRES FOR REHEARING AND, IF FILED, DETERMINED

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA IN AND FOR PINELLAS COUNTY

APPELLATE DIVISION

STATE OF FLORIDA

Appellant,

vs.

Appeal Case No. CRC 09-00060 APANO
UCN No. ~~522009CT009967XXXXXX~~
522009AP000060XXXXCR

ROBERT DETRO

Appellee.

_____ /

Opinion filed: 9/24/10.

Appeal from a judgment and sentence
entered by the Pinellas County Court
The Honorable Judge Susan Bedinghaus

Bernie J. McCabe, Esquire
State Attorney Sixth Judicial Circuit
Attorney for Appellant

Ricardo Rivera, Esquire
Attorney for Appellee

ORDER AND OPINION

DEMERS, JUDGE

This matter is before the Court on the State's appeal from the County Court's Order granting Defendant's Motion in Limine. The Order excluded evidence of hydrocodone

discovered in Defendant's motor vehicle incidental to a lawful search. This Court has jurisdiction and reverses the Order.

Deputy McKenzie stopped the vehicle driven by the defendant for not maintaining a single lane. As a result of facts developed after the stop, the defendant was arrested for DUI. There is no dispute as to the lawfulness of the stop or arrest. During a search of the vehicle, Deputy McKenzie found a bottle containing hydrocodone pills prescribed for the defendant. The Motion in Limine sought to exclude the bottle on the grounds that its probative value was substantially outweighed by the danger of unfair prejudice. Fla. Stat. §90.403. The trial court granted the motion; however, the court ruled that the defendant's post-*Miranda* admission to consuming Lorcet, a hydrocodone derivative, was admissible at trial.

After stopping the defendant's vehicle, Deputy McKenzie observed signs of impairment, including vomit on the defendant's person and the inside of his car, glassy and watery eyes, mumbled speech, and the odor of an alcoholic beverage. Defendant refused both the breath test and field sobriety exercises. After Deputy McKenzie read *Miranda* rights, the defendant denied consuming alcohol but admitted to taking Lorcet three days prior to the incident. The bottle of hydrocodone found in the vehicle contained 48 of the 60 pills prescribed to the defendant two days prior to the incident. The prescription instructed him to take three pills each day.

The State argues that the trial court abused its discretion by granting the Motion in Limine because the probative value of the hydrocodone pills recovered after the defendant's arrest is not substantially outweighed by the danger of unfair prejudice. Relying chiefly on *State v. Varney*, CRC08-00072APANO (Fla. 6th Cir. App. Ct. January 8th, 2010), a case this Court determined just weeks after the hearing on the Motion to Suppress in this case, the State argues that the evidence of the hydrocodone is admissible because 1) there was substantial evidence of

impairment; 2) the defendant's possession of only 48 of 60 hydrocodone pills prescribed two days prior to the arrest indicates that the defendant recently used a controlled substance; 3) there was insufficient evidence that the defendant consumed any substance that explained his impairment; and, 4) there was no evidence that the hydrocodone could not have contributed to his impairment.

The defendant maintains that the odor of alcohol and the presence of vomit observed by Deputy McKenzie provide sufficient evidence of impairment by alcohol. And therefore, the introduction of the evidence of the hydrocodone will only serve to unfairly prejudice the jury. Furthermore, he challenges the State's reliance on *Varney*, arguing that the *Varney* court failed to apply the abuse of discretion standard of review and contradicted Florida District Court of Appeals and Supreme Court decisions.

In *Varney*, this Court ruled that evidence of a DUI suspect's drug consumption should be permitted at trial if: 1) there is significant evidence that the accused was impaired; 2) the accused is in possession of evidence indicating that he or she could have recently used a controlled or chemical substance; 3) there is insufficient evidence that the accused has consumed a substance other than the subject controlled or chemical substance that explains his or her impairment, normally alcohol; and 4) the evidence does not show that the substance found on the accused could not have contributed to the impairment. *Varney*, CRC 08-00072APANO (Fla. 6th Cir. App. Ct. No. January 8, 2010).

The decision in *Varney* was based on these two decisions from the Fourth District: *Estrich v. State*, 995 So.2d 613, 616-618 (Fla. 4th DCA 2008) and *Gonzales v. State,* 9 So.3d 725 (Fla. 4th DCA 2009). In *Estrich*, the court ruled that the trial court abused its discretion in a DUI case in denying a motion in limine to exclude evidence of marijuana found in the defendant's

system and in declining to sever a marijuana charge based on marijuana discovered as a result of the DUI. In *Gonzales*, the court ruled that the trial court did not abuse its discretion in denying a motion to sever a cocaine charge from a DUI charge where the cocaine had allegedly been discovered on the person of the defendant incidental to the DUI arrest.

What accounts for such different results from the same court? In both cases there was significant evidence of impairment. In *Estrich*, the possible causes for the impairment were Xanax and marijuana. In *Gonzales*, the possible culprits were alcohol and cocaine. But in *Estrich*, the evidence focused on Xanax as being responsible for the impairment and established that the marijuana had no effect. Just as in the case at bar, in *Gonzales*, while there was some evidence of alcohol use, it was insufficient to explain the defendant's condition and there was no evidence that cocaine could not have caused his condition. The *Gonzales* court concluded that the possession of cocaine was circumstantial evidence that the defendant was under the influence of a controlled substance. While it was disconcerting to the dissenting judge in *Gonzales* and somewhat surprising to this Court, the court reached that decision in *Gonzales* in the absence of any direct evidence showing that there was any cocaine in the defendant's system.

Defendant's argument that the *Varney* court failed to follow the abuse of discretion standard of review misapprehends the issue and point in *Varney* and at bar. The decisions of the Fourth District are controlling until the Second District or the Supreme Court renders a conflicting ruling. *State v. Barnum*, 921 So.2d 513 (Fla. 2005). Obviously, as the dissenter in *Gonzales* observed, *Estrich* and *Gonzalez* appear to be in conflict. In *Varney*, this Court attempted to synthesize and reconcile the law as expressed in *Estrich* and *Gonzales* in a way that is consistent with the leading authority - *State v. McClain*, 525 So.2d 420 (Fla. 1988) and its progeny.

Neither the court in *Varney* nor the Court here trifles with the fundamental concept of discretion. But it is important to recognize, as recently expressed by the Supreme Court in *Hayward v. State*, 24 So.3d 17, 29 (Fla. 2009): "The trial court's discretion is constrained ... by the application of the rules of evidence, and by the principles of stare decisis." (internal citations excluded). The rules of evidence include judicial interpretation and application of those rules. And, like it or not, in *Gonzales*, the court interprets the rules as allowing introduction of possession of a controlled substance, even one as provocative as cocaine, as circumstantial evidence in some cases. In *Varney*, the Court identified those circumstances based on its analysis and comparison of *Estrich* and *Gonzales*. Thus, the problem is not whether the trial judge here abused her discretion; the problem is whether she followed the law in the exercise of that discretion. Not to be misunderstood, this Court is certain that the trial judge acted in good faith and made the decision she found to be correct, but we find that she simply made a mistake of law.

In fairness to the trial court, *Varney* was unavailable to the judge when the court considered the Motion in Limine. And the record suggests that no one made the judge aware of *Estrich* and *Gonzales*. Based on these decisions, this Court finds that the trial judge erred in granting the Motion In Limine. On remand, the trial court may reconsider the admissibility of the hydrocodone evidence based on *Estrich* and *Gonzales* and the factors set forth in *Varney*. This Court suggests that the trial judge make factual findings utilizing the structure established in *Varney*.

Accordingly, this Court reverses the order granting the Motion in Limine and remands for further proceedings consistent with this opinion.

COVERT and HELINGER, C. JJ. Concur.

DONE AND ORDERED in State v. Detro, (Appeal Case No. CRC 09-00060 APANO) this 23rd day of Sept, 2010 at Pinellas County, Florida.

Original order entered on September 23, 2010 by Circuit Judges David A. Demers, Thane B. Covert, and Chris Helinger.

Copies to:

The Honorable Judge Susan Bedinghaus

Bernie McCabe, Esq.
State Attorney Sixth Judicial Circuit of Florida
Attorney for Appellant

Ricardo Rivera, Esq.
Attorney for Appellee