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

STATE OF FLORIDA

Appellant,

vs.

Appeal No. CRC 12-00008APANO
UCN 522012AP000008XXXXCR

BURTON JOHN ESPY, JR.
Appellee.
_____/

Opinion filed August 10, 2012.

Appeal from an Order Granting a
Motion to Suppress
entered by the Pinellas County Court
County Judge Lorraine M. Kelly

David E. Little, Esquire
Assistant State Attorney
Attorney for Appellant

Ricardo Rivera, Esquire
Attorney for Appellee

ORDER AND OPINION

PETERS, Judge.

THIS MATTER is before the Court on the State of Florida's appeal from an order of the Pinellas County Court granting a Motion to Suppress. After reviewing the briefs and record, this Court reverses the order of the trial court.

Factual Background and Trial Court Proceedings

Appellee, Burton John Espy, Jr. was arrested for driving under the influence. In the ensuing law enforcement investigation Mr. Espy provided breath samples to determine his breath alcohol level. Those samples were obtained using an *Intoxilyzer* maintained by the Pinellas County Sheriff's Office. Cheryl Peacock, an employee of sheriff's office, had performed the last agency inspection on the *Intoxilyzer*.

Mr. Espy filed a motion to suppress the breath test results asserting that Ms. Peacock did not have a valid Agency Inspection Permit at the time of the inspection because she had not satisfied the necessary continuing education requirements. At hearing on the motion Ms. Peacock testified, in part, that she was certified as an agency inspector at the time of the involved inspection. A copy of her agency inspector certificate was admitted into evidence. Laura Barfield, the alcohol testing program manager of the Florida Department of Law Enforcement, testified, in part, to several points; that she wrote Florida Administrative Code Rule 11(d)(8).008(3), she testified as to the agency's interpretation and application of that rule and that Cheryl Peacock was certified as an agency inspector at the time of the involved inspection.

After hearing, the trial court entered a written order granting Mr. Espy's motion. In pertinent part that order provides:

> Ms. Peacock was not eligible to conduct the monthly Agency Inspection on Intoxilyzer #80-001367 on September 22, 2010, contrary to the requirements of the Florida Administrative Code Rule 11D-8.008(3) because her continuing education requirements had lapsed and she did not have a valid Agency Inspector or Breath Test Operator Permit. On October 22, 2010, the date of the Defendant's breath test, Ms. Peacock had not yet completed her continuing education and was, therefore, prohibited by Rule 11D-8.008(4) from performing the duties of Agency Inspector. The Court does not find the testimony of the State's expert about how time is calculated by the Agency under the Rule persuasive. Giving the words

> of the Rule their plain and ordinary meaning and giving "great weight," with all due deference, to the Agency's intent and interpretation, this Court cannot read the Rule to permit more than four years to elapse between certification and renewal.[1] Respectfully, Ms. Barfield's interpretation of the rule at bar is indistinguishable from the interpretation rejected by the Appellate Court in *Young v. State of Florida Department of Highway Safety and Motor Vehicles*, No. 11-000008AP-88A (Fla. 6th Cir. App. Ct. August 24, 2011) at 5. This Court is constrained to follow the controlling, mandatory appellate decision announced in *Young*. Accordingly, all breath test evidence from October 22, 2010, is hereby suppressed.
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> [1]Ms. Peacock took the Agency Inspector Renewal Course on 6-13-05 (the time period for the four-year cycle for renewal commenced on 6-30-05). Although the FDLE data base shows that her permit is valid until 6-30-13 – this calculation of time is not supported by a plain reading of the Rule. Nearly five years and four months elapsed from her original certification and anniversary date until she took a renewal course (for Breath Test Operator) on 3-22-11. This Court finds the Agency's interpretation of the words "four" and "year" and "cycle" to be contradistinct to a plain reading of the words contained in the Rule, particularly the language which states that continuing education must be accomplished "during each subsequent four year cycle." The Court disagrees that four calendar years can be reasonably construed to mean five years, four months; to do so is to take the plain meaning of words outside of the vernacular.

Standard of Review

Our review of a trial court's ruling on a motion to suppress evidence involves a mixed question of law and fact. We accord a presumption of correctness with regard to the trial court's determination of facts where the trial court's factual findings are supported by competent, substantial evidence. However, we review the trial court's application of the law to those facts de novo. *Ornelas v. United States,* 517 U.S. 690, 699, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996); *Connor v. State,* 803 So.2d 598 (Fla.2001); *State v. Pruitt*, 967So2d 1021 (Fla. 2nd DCA 2007); *Newkirk v. State,* 964 So2d 861, 863 (Fla. 2nd DCA 2007).

Regulation of Individuals Who Inspect Breath Test Instruments

The Florida Legislature has delegated responsibility for the regulation of individuals who inspect breath test instruments to the Florida Department of Law Enforcement ("FDLE"). § 316.1932(1)(a)(2), Fla. Stat. (2000). That delegation of authority requires FDLE to "[e]stablish uniform criteria for the issuance of permits to breath test operators, agency inspectors, instructors, blood analysts, and instruments" and to "[p]romulgate rules for the administration and implementation of this section, including definitions of terms." § 316.1932(1)(a)(2)(a) and (l), Fla. Stat. As required, FDLE promulgated Rule 11D-8.008 of the Florida Administrative Code. That rule includes the following:

> (3) Breath Test Operators and Agency Inspectors must satisfy continuing education requirements in order to maintain valid permits. Continuing education requires successful completion of the applicable Commission-approved Renewal Course by June 30 following the fourth permit anniversary date, and during each subsequent four-year cycle. Successful completion of the Commission-approved Agency Inspector Course or Agency Inspector Renewal Course also satisfies an Agency Inspector's breath test operator continuing education requirements.
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> (4) Any Breath Test Operator or Agency Inspector who fails to satisfy the continuing education requirements shall not perform any duties authorized by the permit until successful completion of the applicable renewal course.

Rule 11D-8.008, F.A.C. Trial courts must afford *great deference* to an agency's or department's interpretation of a rule it promulgated concerning matters that are administered by that agency or department. *State v. Sun Gardens Citrus, LLP*, 780 So.2d 922, 925 (Fla. 2nd DCA 2001) (emphasis added). Courts should not depart from that construction unless it amounts to an unreasonable interpretation or is *clearly erroneous.*[1]

[1] The "clearly erroneous" standard of review is borrowed from federal case law. It normally addresses the exercise of an appellate court's power to overturn findings of a trial court. In determining the meaning of this standard, *American Jurisprudence* states:

Falk v. Beard, 614 So.2d 1086, 1089 (Fla. 1993); *Collier County Bd. of County Com'rs v. Fish and Wildlife Conservation Com'n*, 993 So.2d 69, 72 -73 (Fla. 2nd DCA 2008); *D.T. v. Harter*, 844 So.2d 717, 719 (Fla. 2nd DCA 2003) (emphasis added). If an agency's interpretation of its own regulation is merely one of several reasonable alternatives, it must stand even though it may not appear as reasonable as some other alternative. *Sun Gardens Citrus, LLP*, 780 So.2d at 926.

The Present Case

The issue presented in this appeal is whether the trial court could lawfully depart from FDLE's interpretation of the subject rule it promulgated. Laura Barfield, the alcohol testing program manager of FDLE, the person that actually drafted the rule, testified at hearing as to the agency's interpretation of that rule. The rule states "[c]ontinuing education requires successful completion of the applicable Commission-approved Renewal Course by June 30 following the fourth permit anniversary date, and during each subsequent four-year cycle." Simply stated, FDLE's interpretation is that the four-year cycles run one after the other. A four-year cycle begins when the preceding four-year cycle ends; not when the licensed person happens to complete an approved

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One commonly employed formulation of the meaning of the "clearly erroneous" standard states that a finding of fact is clearly erroneous when, although there is evidence to support such finding, the reviewing court upon reviewing the entire evidence is left with the definite and firm conviction that a mistake has been committed. This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently. Such a mistake will be found to have occurred where findings are not supported by substantial evidence, are contrary to the clear weight of the evidence, or are based on an erroneous view of the law. Similarly, it has been held that a finding is clearly erroneous where it bears no rational relationship to the supporting evidentiary data, where it is based on a mistake as to the effect of the evidence, or where, although there is evidence which if credible would be substantial, the force and effect of the testimony considered as a whole convinces the court that the finding is so against the great preponderance of the credible testimony that it does not reflect or represent the truth and right of the case. 5 Am.Jur.2d *Appellate Review* § 672 (1995) (footnotes omitted).

See Dorsey v. State, 868 So.2d 1192, 1208 -1209 (Fla.,2003) (FN16); *See also Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 572-575, 105 S.Ct. 1504, 1511 - 1512 (1985).

Renewal Course. FDLE's interpretation is not unreasonable and is not *clearly erroneous.* The trial court was required to afford *great deference* to that interpretation.

In making its decision the trial court was following, *Young v. State of Florida Department of Highway Safety and Motor Vehicles*, 18 Fla. L. Weekly Supp 1084a (Fla. 6th Cir. App. Ct. August 24, 2011) *cert. denied* --- So3d ----, (Fla. 2nd DCA 2012) (No. 2D11-4693). The *Young* case was an appeal of the decision of a hearing officer from the Department of Highway Safety and Motor Vehicles affirming the suspension of Mr. Young's driving privilege.[2] In that case the court quashed the "Findings of Fact, Conclusions of Law and Decision" of the Hearing Officer. In their opinion the *Young* court commented on an argument presented in that appeal by the Department of Highway Safety and Motor Vehicles. The FDLE was not a party to or otherwise involved in that appeal. The *Young* court wrote, "[the argument] claims that the anniversary date of the of the Breath Test Operator's certification alone controls the calculation of the deadline for the completion of continuing education. This Court concludes that such an interpretation clearly is erroneous." We consider that comment to be *judicial dicta.*[3] *Judicial dicta* are comments in a judicial opinion that are unnecessary to the disposition of the case, but involve an issue briefed and argued by the parties. *Frost v. State*, 53 So.3d 1119, 1123 -1124 (Fla. 4th DCA 2011). That *dicta* of the *Young* court is not a

[2] The case involved an administrative hearing conducted by the Department of Highway Safety and Motor Vehicles. No judge and no prosecutor were present. No representative of FDLE was present. The only testimony presented was Defense Attorney Rivera questioning three law enforcement officers. There was no testimony or evidence from FDLE; no evidentiary basis to know what FDLE's interpretation or application of the rule involved in that case was.

[3] The *Young* court was not required to afford *great deference* to the Department of Highway Safety and Motor Vehicles' interpretation of the involved rule. That department did not promulgate the rule and did not administer the rule. The *Young* court could substitute its own construction of the rule whether the Hearing Officer's rule interpretation was clearly erroneous or not. The comment of the *Young* court that the Department of Highway Safety and Motor Vehicles' rule interpretation was clearly erroneous was unnecessary to the disposition of the case.

precedent this court will follow.

This court concludes the trial court in the present case had no lawful basis to disregard FDLE's interpretation of the rule it promulgated and administered or to disregard FDLE's certification that Cheryl Peacock was an agency inspector at the time of the inspection in this case.

Conclusion

The Florida Department of Law Enforcement's interpretation of Rule 11D-8.008 of the Florida Administrative Code is not unreasonable and is not *clearly erroneous.* This court and the trial court are required to afford *great deference* to that interpretation. There was no lawful basis for the trial court to disregard that interpretation of the rule or to disregard the Florida Department of Law Enforcement's certification that Cheryl Peacock was an agency inspector at the time of the inspection in this case. The order of the trial court granting Mr. Espy's Motion to Suppress should be reversed.

IT IS THEREFORE ORDERED that the order of the trial court granting Mr. Espy's Motion to Suppress is reversed.

ORDERED at Clearwater, Florida this 10th day of August, 2012.

Original order entered on August 10, 2012, by Circuit Judges Raymond O. Gross, L. Keith Meyer, Jr., and R. Timothy Peters.

cc: Honorable Lorraine M. Kelly
Office of the State Attorney
Ricardo Rivera, Esquire