1. 2008 Emerging Issues 2263, Judge David M. Gersten on State v. Busciglio

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Judge David M. Gersten on State v. Busciglio: A Defendant’s Right To Counsel During A Traffic Stop For DUI in Florida

Summary

Judge David M. Gersten on State v. Busciglio, 976 So. 2d 15 (Fla. Jan. 23, 2008), and a defendants right to counsel during a traffic stop for DUI. State v. Busciglio, held that Florida courts should not suppress a defendants refusal to submit to an alcohol breath test based on the defendants right to counsel prior to the test. Thus, Busciglio adversely impacts a defendants right to counsel at a stage where criminal liability attaches.

Article

Section 316.1939, Florida Statutes. Prior to July 1, 2002, DUI defendants had a disincentive to supply a breath test because refusal did not result in criminal charges. Refusal, however, could result in a license suspension, and the refusal would be admissible into evidence in any criminal proceeding. § 316.1932(1)(a), Fla. Stat. (2001). Thus, license suspension was an administrative remedy for public protection, and not criminal punishment for the DUI offender.

On July 1, 2002, the Florida Legislature enacted section 316.1939, Florida Statutes, which made it a first degree misdemeanor for a second-time DUI offender to refuse a breath test. On its face, this change was unwelcome news for DUI offenders. They were now placed in the difficult position of either submitting to a breath test and possibly providing incriminating results for use at a DUI trial, or refusing the test and facing a first degree misdemeanor charge.

State v. Busciglio: The Trial Level. At the trial level, during a motion to suppress hearing, defense counsel in State v. Busciglio, 976 So. 2d 15 (2008), argued that Article I, Section 9 of the Florida Constitution protected his client because “[n]o person shall be deprived of life, liberty or property without due process of law . . . or be compelled in any criminal matter to be a witness against oneself.” Busciglio, 2008 Fla. App. LEXIS 725 *7.

Defense counsel contended that because section 316.1939 attaches criminal liability to a driver’s refusal to take a breath test, Article I, Section 9 of the Florida Constitution gives Busciglio the right to counsel before making this potentially hazardous decision. The trial court agreed and granted the motion to suppress. The State of Florida appealed.

State v. Busciglio: The Appellate Level. On appeal, the Second District Court of Appeal reversed the trial court’s decision. The Second District found that the protections of Article I, Section 9 of the Florida Constitution are limited to instances of “custodial interrogation” where defendants are subject to “express questions, or other words or actions by a state agent that they should have known were reasonably likely to elicit an incriminating response.” Busciglio, 2008 Fla. App. LEXIS 725 *7 (citing Traylor v. State, 596 So. 2d 957, 966 (Fla. 1992)).

The Second District held that requesting submission to a breath test is not a question designed to lead to an incriminating response. Rather, “interrogation can extend only to words or actions on the part of police officers that should have known were reasonably likely to elicit an incriminating response.” See Timmons v. State, 961 So. 2d 378, 380 (Fla. 4th DCA 2007). The court explained that “questions which are not designed to lead to an incriminating response would not make a person feel compelled to incriminate himself or herself.” Busciglio, 2008 Fla. App. LEXIS 725 *10.

Further, the opinion posits that a suspected DUI defendant has voluntarily consented to a breath test by driving a car in the State of Florida. See Fla. Stat. § 316.1932. Thus, since Busciglio had already consented to a breath test, the officer’s question was merely an opportunity for Busciglio to withdraw that consent.

Finally, the Second District determined that even if a defendant’s refusal may be considered incriminating, the right to an attorney, pursuant to Article I, Section 9 of the Florida Constitution, only attaches where the defendant’s statements are “testimonial” in nature. Busciglio, 2008 Fla. App. LEXIS 725 *12.

A “testimonial” communication occurs insofar as “the primary purpose of [an] interrogation is to establish or prove past events potentially relevant to later criminal prosecution.” Busciglio, 2008 Fla. App. LEXIS 725 *13 (citing Davis v. Washington, 547 U.S. 813 (2006)).

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Busciglio’s refusal to submit to a breath test could not possibly qualify as “testimonial” because the officer’s question was not about a past event. Instead, it was about a current event—whether Busciglio would take the test at that moment in time. Busciglio, 2008 Fla. App. LEXIS 725 *10. Thus, the right to counsel does not attach. See Fisher v. United States, 425 U.S. 391 (1976).

The Effect of Busciglio. Busciglio makes it difficult to counsel a DUI client. Practitioners, who used section Fla. Stat. § 316.1939 to trigger their client’s right to an attorney, find themselves without this ammunition. Instead, Busciglio will complicate the lives of both DUI defendants and their attorneys by barring advice from counsel before a breath test.

Although the Second District determined that Florida law never provided a right to counsel before taking a breath test, Florida had never attached criminal liability for refusing the test. Busciglio, dismissing this distinction, emphasized that one can claim freedom from self-incrimination and a right to counsel in limited circumstances. Busciglio determined that, for DUI defendants, facing a breath test is not one of these circumstances.

Yet, the other district courts of appeal have not faced this issue. Therefore, it is possible that other district courts of appeal may disagree with the Second District. However, it is the only case that exists on this issue.

Conclusion. In the wake of Busciglio, Florida DUI attorneys should know that their clients do not have the right to contact them for advice prior to submitting to a breath test. Accordingly, practitioners, whenever and however possible, should advise their clients before the clients face criminal ramifications between furnishing and refusing a breath test.

About the Author(s)

David M. Gersten

Judge David M. Gersten is currently a judge on the Third District Court of Appeal where he was appointed in 1989. Prior to his appointment, he was in private practice from 1975 until 1980. He was elected to the Dade County Court in 1980 and elected to the Eleventh Judicial Circuit in 1982. In 1995, he was appointed as Associate Dean, Appellate Division, at the Florida College of Advanced Judicial Studies, and became a member of the Florida Court Education Council in 1996. He is the author for the Florida Civil Practice Guide, a multi volume set published by LexisNexis/Matthew Bender, and he is a judicial consultant for LexisNexis Practice Guide: Florida Pretrial Civil Procedure.

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