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 12-00026APANO
UCN: 522012AP000026XXXXCR

RYAN ALLEN
Appellee.
_____/

Opinion filed December 26, 2012.

Appeal from an Order Granting a
Motion to Suppress
entered by the Pinellas County Court
County Judge Donald E. Horrox

Jess Maples, 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. The Appellee, Ryan Allen, asserted in his motion that his breath test results should be suppressed because the person

who performed the last inspection on the involved *Intoxilyzer* did not have a valid Agency Inspection Permit for lack of required continuing education requirements. This court reverses the order of the trial court.[1]

Background

Appellee, Ryan Allen, was arrested for driving under the influence. In the ensuing law enforcement investigation Mr. Allen 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. Allen 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. There was a stipulation that the testimony of Laura Barfield, the alcohol testing program manager of the Florida Department of Law Enforcement, from another case would be admitted into evidence. Ms. Barfield testified, in part, that she wrote Florida Administrative Code Rule 11(d)(8).008(3); she also testified as to the agency's interpretation and application of that rule. There was a further stipulation that the testimony of Patrick Murphy, a department inspector of the Florida Department of Law Enforcement, from another case would be admitted into evidence.

[1] This court entered an opinion on the same point of law in *State v. Espy*, 19 Fla. L. Weekly Supp 993a (Fla. 6th Cir. App. Ct. August 10, 2012). The order of the trial in the present case was entered prior to the *Espy* opinion.

Mr. Murphy testified as to Cheryl Peacock's breath test operator and agency inspector dates and that she had a valid permit from 2005 to 2012.

After hearing, the trial court denied Mr. Allen's motion. Mr. Allen filed a Motion for Rehearing arguing in part:

> That on April 4, 2012, the Second District Court of Appeal issued its ruling in the case of *State v. Young.* The court denied the State's appeal, upholding the 6th Judicial Circuit's opinion interpreting the Administrative Rules in a manner that would require Agency Inspectors and Breath Test Operators to complete their respective refresher courses within 4 years of the date the permit was issued or the date the last refresher course was completed.

The trial court granted the Motion for Rehearing and the Motion to Suppress. This appeal was timely filed.

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.*[2]

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[2] 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:

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).

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. The testimony of Laura Barfield, the alcohol testing program manager of the Florida Department of Law Enforcement, from another case was admitted into evidence. She is the person that actually drafted the rule. Her testimony explained 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 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.

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).

6th Cir. App. Ct. August 24, 2011) *cert. denied* 84 So3d 317, (Fla. 2nd DCA 2012).[3] 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.[4] 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.*[5] *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 -

[3] [A] denial of certiorari by an appellate court cannot be construed as a determination of the issues presented in the petition therefor and **cannot be utilized as precedent or authority for or against the propositions urged or defended in such proceedings**." *Southern Bell Tel. & Tel. Co. v. Bell,* 116 So.2d 617, 619 (Fla.1959) (citing *Collier v. City of Homestead,* 81 So.2d 201 (Fla.1955)); *see also Carol City Utils., Inc. v. Dade County,* 183 So.2d 227 (Fla. 3d DCA 1966); *State v. Edwards,* 135 So.2d 889 (Fla. 2d DCA 1961). In other words, a "denial of certiorari is not to be construed as an opinion on the merits of the petition." *Johnson v. Florida Farm Bureau Cas. Ins. Co.,* 542 So.2d 367, 369 (Fla. 4th DCA 1988); *see also Bing v. A.G. Edwards & Sons, Inc.,* 498 So.2d 1279 (Fla. 4th DCA 1986); *Accent Realty of Jacksonville, Inc. v. Crudele,* 496 So.2d 158 (Fla. 3d DCA 1986). The reasoning from these cases can be applied to the instant case because in neither the denial of certiorari nor the discharge of a writ of certiorari as improvidently issued does the appellate court decide or rule on the merits of the case. *Shaps v. Provident Life & Acc. Ins. Co.,* 826 So.2d 250, 253 (Fla. 2002) (emphasis added).

[4] 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.

[5] 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.

1124 (Fla. 4th DCA 2011). That *dicta* of the *Young* court is not a precedent this court will follow. The *Young* decision is not controlling precedent or authority that this court must observe; Mr. Allen's argument that the *Young* case is binding precedent is incorrect. A denial of certiorari by an appellate court cannot be construed as a determination of the issues presented in the petition therefor and cannot be utilized as precedent or authority for or against the propositions urged or defended in such proceedings. *Shaps v. Provident Life & Acc. Ins. Co.*, 826 So.2d 250, 253 (Fla. 2002).

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. Allen's Motion to Suppress should be reversed.

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

ORDERED at Clearwater, Florida this 26th day of December, 2012.

Original order entered on December 26, 2012, by Circuit Judges Raymond O. Gross, L. Keith Meyer Jr., and R. Timothy Peters.

cc: Honorable Donald E. Horrox
Office of the State Attorney
Ricardo Rivera, Esquire