

IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT
IN AND FOR SEMINOLE COUNTY, FLORIDA

APPELLATE DIVISION

APPEAL CASE NO. 08-32 AP

COUNTY COURT CASE NO.S:

79668-G, 190856-G, 190857-G,
190858-G, 190859-G, 233389-G,
233390-G, 233391-G, 233392-G,
233393-G, 274391-G, 284674-G,
356335-G, 356336-G, 365247-G

CHRISTOPHER M. BAIRD,

Appellant,

v.

STATE OF FLORIDA
DEPARTMENT OF TRANSPORTATION,

Appellee.

Opinion filed April 22nd, 2008

Appeal from the County Court
for Seminole County, Florida
Honorable Ralph Eriksson,
County Court Judge.

Wayne Culver, Esquire, for Appellant

William J. Trappen, Esquire for the Appellee

GALLUZZO, J.

It appears from the record that the Appellant, Christopher M. Baird, an Osceola County Firefighter/Paramedic ran into a firestorm of bureaucracy that even he was not trained nor equipped to handle. This consolidated appeal arises from what can only be

characterized from the record as a tragic series of injustices that require the Court to not only expedite this appeal but to take immediate remedial action. Further, based upon the potential for continuing harm to the citizen's of the Eighteenth Judicial Circuit, this Court must take further action.

The Appellant, like so many who travel the toll roads of this state entered into a License and Use Agreement with the Orlando-Orange County Expressway Authority (hereinafter "Authority") for the use of what is commonly known as an EPASS, an electronic transponder which allows the user to travel about the toll roads of the Authority and the State of Florida and to do so by paying the tolls at each location by deduction from a prepaid account, secured either by cash replenishment or authorized periodic charges to a credit card on file. The License and Use Agreement (hereinafter "Agreement"), which Appellant entered into with the Authority, states in sections 10, 11, and 13 the procedure that all users must follow in the event of damage or malfunction of their transponder.

Unfortunately for the Appellant, his first discovery of a problem was after he tried to renew his vehicle registration which was denied due to outstanding toll violation citations. This was on December 30, 2007. Many of the tickets that are the subject of this action date back to May and June of 2007. The Appellant alleges that he never received the citations and that when he was made aware of their existence by the tag office, he contacted the Authority and tried to rectify the problem. As it turned out, the violations were due to a faulty transponder on his Wife's vehicle, but because his name was first on the registration, the tickets were issued in his name by the Authority through the Office of Toll Operations, Florida Department of Transportation (hereinafter

“FDOT”), in their interpretation of their right to do so in accordance with F.S. 316.1001 (2007). This statutory provision creates a mechanism by which an alleged offender may challenge the citation by filing an affidavit within 14 days of the citation’s **date of issue** (emphasis added).

Although the Appellant in accordance with the requirements of Florida Law upon moving changed his address with the proper authorities (the tax collector of the county of his residence) the citations, at the direction of the Authority and FDOT were sent to an old and outdated address “[b]ecause the Department of Highway Safety and Motor Vehicles did not update his database even after the Defendant (Appellant) had changed his address with that department and received a registration back form (from) that department showing the change of address. As a result, the toll citations were mailed to his old address”, (*Stipulated Motion to Withdrawal of Plea of record filed by the Appellant below and State of Florida Department of Transportation*). The Appellant had not lived at the address the citations were sent to for 3 years.

The Appellant, by the admissions of FDOT, could not have followed these statutory procedural challenges to the citations and afford himself a remedy as the time for his challenges to the citations had long since past. Consequently, the Appellant took the only steps he perceived were available to him in his attempt to lift the suspension of his driver’s license and preserve his job as a firefighter, which requires him to possess a valid drivers license.

The Appellant paid every citation, \$90.50 per citation (not inclusive of other costs), instead of the \$25.25 fine for each act that he would have been able to pay if he chose to not challenge the citations, had the citations had been sent to his proper address.

Of course had he been afforded appropriate notice as required by law, he could have requested a hearing within 75 days of the date of the citations to challenge them. To add insult to misery, the Appellant, having lost all right to challenge the citations and being faced with the only choice available to have his license reinstated through payment of each citation, was unaware that paying each citation after the time for hearing had expired, constituted an admission of guilt of the commission of a non-criminal moving violation pursuant to chapter 318 of the Florida Statutes, which requires the imposition of 3 points on his driving record, per citation. The end result is that the Appellant's driving record has accumulated 48 points requiring suspension, and for him, by career path, requires termination of employment.

To his credit, the attorney of the Appellee, when being made aware of Appellants now dire circumstances, and recognizing the manifest injustice that was now ruining the life of this dedicated public servant through an administrative error, prepared a Stipulated Motion For Withdrawal of Plea, filed it with the lower court and asked for hearing.

The matter was scheduled for hearing before the lower court so the stipulated motion could be heard. The motion stipulated error by FDOT in the issuance of the citations for failure to properly update their own records and those of the Authority with regard to the Appellants address, which resulted in the citations being issued to the wrong address. It further stated that upon the pleas being set aside, the FDOT would drop all the citations, which would have resulted in a clearing of Appellants driving record, reinstatement of his driver's license and return of his fines. As there is no record transcript of the lower court proceedings filed with this Appeal as to the lower courts

reasoning for denying relief, this Court will not speculate why the requested relief was denied. This appeal follows the denial of relief by the lower court

Florida Statute 316.1001 (2007) was enacted to grant the various toll road agencies a vehicle by which to deter users of the roadways under their control from “running” i.e. passing through toll collection points without paying. The statute provides certain procedural safeguards for the alleged violator to challenge a citation issued for the alleged violation and sets out penalties for such alleged violations if they are found to have occurred or if the alleged violator admits their guilt or opts to pay a fine in lieu of a challenge.

The statute makes such a violation a noncriminal traffic infraction punishable as a moving violation and as such any hearing or proceeding as to the enforceability of such a citation is governed by the Florida Rules of Traffic Court (FRTC) (2007). FRTC Rule 6.460 makes applicable the Florida rules of evidence in any hearing. FRTC Rule 6.450 sets forth the order of any hearing as to any uniform traffic citation, which encompasses a toll violation citation. The Appellant, should he have been given proper notice, could have elected to contest the citations, been afforded a proper hearing before a neutral Judge or Traffic Hearing Officer, and been afforded impartial determination of his guilt. Due to the admitted error of the Authority through its agent FDOT, he was not afforded this right of due process.

Should he have been given an opportunity for this hearing, it cannot be said Appellant would not have prevailed. The Authority through FDOT as the prosecuting authority has the burden of proving the act occurred **and that the Appellant committed the act** (emphasis added). Although F. S. 316.1001 (2) (d) (2007) creates a rebuttable

presumption against the owner of the vehicle alleged to have committed the toll violation (through use of a picture of the license plate of the vehicle taken contemporaneously at the time of the alleged violation), this evidence alone is insufficient for a finding of guilt. The statute itself provides for a 14 day challenge period through the filing of an affidavit (F.S. 316.1001 (2)(c) (2007)), presumptively in recognition of the fact that all moving violations require more than a mere tag number, but the actual identification of the driver of the vehicle and the vehicle itself. This 14 day period is set aside to allow the owner an opportunity to advise the FDOT and the court in the case of a hearing, any information as to who the driver was if not the owner, or if the vehicle was stolen, so the person cited may challenge the issuance of the citation. The statute goes on to state that photographic evidence along with a written report of a toll enforcement officer, although admissible, merely raises a rebuttable presumption that the vehicle named in any report by the toll enforcement officer was involved in the violation.

Therefore, the FDOT would have to prove at a hearing, not only that the Appellants vehicle committed a toll violation, but that he was the driver of the vehicle at the time the toll violation was committed. F.S. 316.1001 (1) (2007) states that a **person** (emphasis added), i.e. the person driving the vehicle, may not use any toll facility without payment of toll unless exempt pursuant to F.S. 338.155 (2007) (more on this later). A photographic image of the rear of a vehicle attached to a citation, without proof as to who the driver was at the time of the violation, even in light of this statutes' rebuttable presumptions, is insufficient to enforce the citation issued to the registered owner of the vehicle as against that owner. The burden of proof for a moving violation is the FDOT's, not the vehicles owner.

The statute attempts to impermissibly shift the burden to the owner of a vehicle to prove they were not the driver (F.S. 316.1001 (2) (c) (2007)). F.S. 318.14 (2) (2007) exempts a driver from having to sign the citation (although the Appellants citations contain a signature line for a Defendant). It does not however exempt the FDOT from having to prove that the person cited for a noncriminal moving violation was in fact the person operating the vehicle. To allow the FDOT to assess points against the driving record of the first named owner of a vehicle when a citation is issued for a moving violation without having to prove that person was the driver of the vehicle, i.e. in control of the vehicle when the toll violation is alleged to have occurred, would be a denial of that persons right of due process, which cannot be abridged by an impermissible shifting of the burden of proof. To allow for such a result, would authorize law enforcement officers to issue citations to any first named owner of a vehicle that they determine was exceeding the speed limits, driving carelessly or committing any other non-criminal moving violation, without ever having to stop a vehicle. They would merely write the citation, mail it to the last know address of the first registered owner, and show up in traffic court without ever having to identify a driver. Although the argument might be made that F.S. 318.14 (2) (2007) would not afford this because it does not exempt the drivers from having to sign these types of citations, the intent of F.S. 318.14 (2) (2007) as it relates to alleged violators of F.S. 316.1001 (2007) is a protection for the driver from having to sign the citation and thus avoid criminal penalties under F.S. 316.14 (3) (2007) for not signing a moving traffic citation, not an exemption for law enforcement officers to properly issue moving violation citations.

The statute itself makes exceptions for certain owners of vehicles by exempting out the owner of a leased vehicle from liability for a toll violation citation and even exempts them from the requirement of filing the affidavit under subsection (c) (2) of F.S. 316.1001 (2007) if the vehicle is registered in the name of a lessee. Thus it excludes a person from liability even if they are the owner of the vehicle, and one who may have actually been the person who committed the violation, just because they are not the registered owner at the time the citation is issued, and provides that they are to be treated differently from an owner who also registers the vehicle who must file an affidavit to avoid the presumption's applicability to them, even if they might not have been driving the vehicle at the time. This provision in the statute appears to impermissibly protect one class of individuals, that being persons or in reality, dealers of automobiles who lease vehicles but retain ownership, from being responsible for the individual acts of the lessee. However, it is not without possibilities that a lessor who is the owner could be themselves or through their agents (repairman, transporter's etc.) be the violator yet escape responsibility for their act of violation.

To make things even more complicated, a vehicle jointly owned according to F.S. 316.1001 (2) (b) (2007) requires the issuance of a citation to the first named owner on the registration, and if that joint owner fails to pay the citation, his or her license will be suspended (as what has happened to the Appellant) even if they never possessed the vehicle or operated it at the time of the violation. The second named owner, even if a co-equal owner is unaffected, even if they were the toll violator. Although this Court stops short of reviewing this statute on constitutional grounds, it is not without concern for inherent defects in this law.

F.S. 316.1001 (1) (2007) states “[A] person may not use any toll facility without payment of tolls, except as provided in s.338.155 (2007).” F.S. 338.155 (1) (2007) states in part “[T]he failure to pay a prescribed toll constitutes a noncriminal traffic infraction, punishable as a moving violation pursuant to s. 318.18 (amount of penalties). The department (FDOT) is authorized to adopt rules relating to guaranteed toll accounts.” Accounts such as SUNPASS, EPASS and OPASS are guaranteed toll accounts. The Authority, by contract, has adopted rules that relate to these accounts and has through these contracts (Agreement) provided for remedies in the event of a nonpayment of a toll by an account holder (FDOT’s Agreement attempts to invoke F.S. 316.1001 (2007) but does not make it the only remedy available to them for an account holder who has not paid a toll; it only does so in connection with the account not having a sufficient balance, not the myriad of other reasons the transponder may not have functioned, including problems with their own transponder recognition equipment).

F.S. 338.161 (2007) creates in the FDOT and a toll agency (such as the Authority) the authority to promote electronic toll collection through among other things, electronic toll collection products and services (i.e., SUNPASS, EPASS, and OPASS).

Appellant, like so many today, entered the Agreement with the Authority that is required to utilize a guaranteed EPASS (prepaid account pursuant to Section 6 of the Agreement). The Agreement clearly sets forth many remedies available to the Authority including ones for those account holders who may from time to time “violate” a toll by nonpayment, due to problems with their guaranteed account or transponder. Section 15 D of the Agreement states:

[I]f for any reason User’s Prepaid Account balance is insufficient for tolls, fees, fines, or any other charges due or owing to the Authority, User shall remain liable to the

Authority for such insufficiencies and all applicable charges, and any funds received by the Authority for the User's account shall first be applied to reduction of such debt and then but only then, to the credit of future transactions."

Section K states: "[T]he Authority reserves the right to offset amounts owed to the Authority for usage of the transponder from funds in the User's Prepaid Account."

It would seem logical to believe that the legislature's intent in enacting F.S. 316.1001 was to provide a mechanism to deter toll violators who could not otherwise be required to pay these tolls by other means. It is illogical to believe the legislature would have expected that a toll agency with the authority vested in them by the legislature to contractually bind a user such as the Appellant to pay for tolls as they used the toll roads, having secured credit cards or funds from him for auto replenishment of his accounts, would utilize this statute to enforce their contracts. The legislature by statute gave these authorities the ability to govern themselves and to enter such agreements with their users as an alternative to the stop and go payment method. Little use would be these corridors of high speed transportation if every user was required to stop at every toll plaza to physically pay each toll. Our local roads, which these toll roads were built in part to alleviate overcrowding of, would again be filled with vehicle owners who would rather not pay a toll to drive to the same point when they could use a free road that would get them there at the same time without the cost and congestion of snails pace toll roads due to congested toll plazas. It is common knowledge that these authorities utilize F.S. 316.161 (2007) to promote the use of electronic toll collection products which require user agreements for the express purpose of making one's use of the roads more convenient and time effective travel routes.

In the Appellants cases, The Authority not only knew which vehicle went through the toll (remember they photograph the rear of the vehicle to obtain the license plate number so they can issue the citation, and include the photograph on the citation) but they had the Appellants account and credit card to debit when the transponder failed to register. In this technology age, it is hard to believe that it would take more than a few computer keystrokes to rectify the problem of matching alleged violators to account holder's vehicles. Every EPASS, SUNPASS and OPASS holder is required to input themselves on-line or at the individual authorities office through their staff, the license plate, year, make, model and color of each vehicle the transponders will be affixed to before the account can be activated. The FDOT and the Authority would have to research each license plate of each alleged violator to locate the information of the vehicle owner to mail the citation. Why is it that they should not use the same information to determine if that registered owner is also a prepaid or guaranteed account holder against whose account the charges could be assessed? This would save countless citizens the obligation to file affidavits, appear in court and otherwise defend against the actions of FDOT and the Authority.

The citizen's of this circuit and this state should never be subjected to the bureaucratic morass this Appellant was subjected to because the Authority, with whom he had a contractual relationship for the payment of tolls, failed to serve him as a citizen of this state but instead used an enforcement power that should be reserved for those who actually intentionally violate the law and as to whom the Authority has no other means of enforcement. The Authority is bound by the terms and conditions of the Agreement they require all user's to execute. They have remedies available by contract. They have the

ability under statute to adopt rules relating to guaranteed accounts which the Authority has adopted through their Agreement and which exempt these account holders from applicability of F.S. 316.1001 (2007). The Authority, having entered into a contractual agreement with the Appellant and presumably thousands of other citizens of Florida, cannot enforce F.S. 316.1001 (2007) against its guaranteed or prepaid account holders as they are exempt. They cannot fail to enforce their own remedies by contract or refuse to mitigate their damages because their contracts allow them to utilize the funds in the account of the Appellant and other contractual users should a violation occur, and absent sufficient funds, may seek remedies by a civil action, not a traffic court action against these users as these users are exempt.

Although the License and Use Agreement of the Authority Section 15 (L) of the agreement states:

[T]his Agreement shall be deemed to have been executed and will be performed in Orange, County, Florida. All disputes and questions on interpretation shall be governed by and construed in accordance with the Laws of the State of Florida, and venue for any action or proceeding arising hereunder shall be in Orange County, Florida,

this Court will leave for a future proceeding, should one arise, the issue of venue for enforcement of any action against a prepaid or guaranteed account holder of the Authority in the civil courts of this circuit, as the Court will remedy the Appellants matter on other grounds (the SUNPASS agreement also places venue in Orange County, Florida and the United States District Court for the Middle District of Florida, Orlando Division.)

Turning to the final issue of the remedies available to rectify this unfortunate and troublesome process that this citizen of Florida has been subjected to, relief for this Appellant can be found in FRTC Rule 6.490 (a) (2007) which states:

[A]n official (defined as any state judge or hearing officer with authority to hear traffic court matters) may at any time correct an illegal penalty.

It would be a manifest injustice to the Appellant to subject him to the penalties that have been imposed as the lower court should have utilized the broad language of this rule, in light of the Stipulated Motion For Withdrawal of Plea which in its essence is a confession of error and in fact admitted error. Justice is blind so that all will be treated fairly. Justice however should never be deaf.

Accordingly, this Court reverses the lower courts denial of the Appellants Stipulated Motion For Withdrawal of Plea and hereby accepts the motion as well founded. The motion confesses error on the part of the Department of Highway Safety and Motor Vehicles and the Court accepts the confession of error and hereby Dismisses all causes of action giving rise to this appeal as against the Appellant pursuant to FRTC 6.490 (a) (2007). The Department of Motor Vehicles of the State of Florida is ordered to remove all suspensions from the Appellants driving record and to reinstate his driver's license without restriction and is further ordered to remove all notation in his records related to these citations, and any previous suspensions and reinstatements related to these citations as this matter has been confessed as error by FDOT. Any assessed points shall be removed as they were assessed against Appellant in error. The State of Florida and the Clerk of the Court for Seminole County, Florida are hereby ordered to refund INSTANTER to the Appellant all fines, fees, penalties and surcharges assessed against him and paid by him when these citations were paid.

The Court having determined that EPASS and SUNPASS users have license agreements for prepaid and guaranteed accounts with the authority of each service, and having found that these users are exempt from enforcement of toll violations pursuant to

F.S. 316.1001 (2007), the FDOT, Florida Turnpike Authority, and Orlando-Orange County Expressway Authority are hereby enjoined from filing any toll violation action in the Eighteenth Judicial Circuit of Florida for violation of F.S. 316.1001 (2007) as against any prepaid or guaranteed account holder who has entered an agreement with these authorities for EPASS or SUNPASS services. The Clerk of the Court of Seminole and the Clerk of the Court of Brevard County are hereby ordered to refuse the filing of such citations for violation of F.S. 316.1001 (2007) by these authorities and their enforcement officers or any other state agency with the authority to issue such citations until such time as the enforcement officer files a report under oath stating that such violator is not a prepaid or guaranteed account holder and does not have a valid agreement for the same with the authority for whom they are attempting to enforce this statute. The County Courts of both Seminole and Brevard are hereby ordered to dismiss any action currently pending where such an affidavit has not been filed.

Copies furnished this 22nd day of April, 2008 to:

All Judges, Brevard and Seminole Counties
Clerk of Court Seminole County
Clerk of Court Brevard County

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