

IN THE SUPREME COURT OF FLORIDA

CASE NO. \_\_\_\_\_

STATE OF FLORIDA, DEPARTMENT  
OF HIGHWAY SAFETY AND MOTOR  
VEHICLES,

Petitioner,

-vs-

DAVID D. ROBERTS,

Respondent.

\* \* \* \* \*  
\*

ON PETITION FOR DISCRETIONARY REVIEW

FROM THE FIFTH DISTRICT COURT OF APPEAL

\* \* \* \* \*  
\*

**PETITIONER'S BRIEF ON JURISDICTION**

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## INTRODUCTION

The Petitioner, **DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES**, was the Petitioner in the proceedings below. In this brief, the parties will be referred to as they stand in these proceedings, or by Respondent's name and Department. All references to the attached appendix will be designated "App." followed by the appropriate page number, if necessary.

## STATEMENT OF THE CASE AND FACTS

Respondent was stopped by a trooper and the charging affidavit stated, "Observe[d] the above named defendant violate F.S.S. 316.187(1) by traveling at 71 mph in a 45 mph speed limit area. When I pulled up behind the defendant and attempted to pull him over he traveled for approximately another tenth of a mile before pulling over." (App. A., p.2)<sup>1</sup>. An administrative driver's license suspension resulted from the stop and Respondent sought review in the circuit court. The circuit court concluded that the facts as detailed in the charging affidavit were insufficient to establish that the officer's suspicions were reasonable. The circuit court quashed the decision of the hearing officer and the Department sought review in the Fifth District. The Fifth District denied a petition for

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<sup>1</sup> The factual background of the stop in this case is succinctly recited in Judge Sawaya's dissenting opinion. (App. A, SAWAYA, J., dissent at p. 1-4).

certiorari seeking to quash the circuit court's order and Petitioner thereafter timely filed his intent to seek discretionary review from this Court.

**POINTS INVOLVED ON APPEAL**

**WHETHER THIS COURT SHOULD ACCEPT DISCRETIONARY JURISDICTION IN THIS CAUSE SINCE THE DECISION BELOW EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISIONS OF THIS COURT AND OTHER DISTRICT COURTS OF APPEAL ON THE SAME QUESTION OF LAW?**

**SUMMARY OF THE ARGUMENT**

Petitioner respectfully requests this Court, in its discretion, to accept jurisdiction in this case. The decision of the Fifth District Court of Appeal expressly and directly conflicts with the decisions of this Court as well as the First and Third Districts concerning clearly established principles of law regarding probable cause for a stop of a vehicle. The Fifth District held that the officer's arrest affidavit that stated he observed Roberts' car traveling 71 mph in a 45 mph speed limit zone was not competent, substantial evidence to establish probable cause for the stop. (App. A, p. 3).

This Court announced the proper test for a traffic stop in Dobrin v. Department of Highway Safety and Motor Vehicles, 874 So.2d 1171 (Fla. 2004). In both State v. Joy, 637 So. 2d 946 (Fla. 3d DCA 1994 and State v. Eady, 538 So. 2d 96 (Fla. 3d DCA

1989, the Third District held that an officer's observations, visual or aural, of unlawful speed are enough to justify the officer's decision to stop the vehicle for the offense of speeding. In Department of Highway Safety and Motor Vehicles v. Nelson, 823 So.2d 828 (Fla. 1st DCA 2002), the First DCA held that an arresting officer could testify about a driver's speed without satisfying predicates for such testimony applicable in traffic court. Thus, the instant case is irreconcilable with Dobrin, Joy, Eady, and Nelson.

#### ARGUMENT

THIS COURT SHOULD ACCEPT DISCRETIONARY JURISDICTION IN THIS CAUSE SINCE THE DECISION BELOW EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISIONS OF THIS COURT AND OTHER DISTRICT COURTS OF APPEAL ON THE SAME QUESTION OF LAW

"The discretionary jurisdiction of the supreme court may be sought to review decisions of district courts of appeal that expressly and directly conflict with a decision of another district court of appeal or of the supreme court on the same question of law." Fla. R. App. P. 9.030(a)(2)(A)(iv). See also Art. V, § 3(b)(3) - (4), Fla. Const. Decisions are considered to be in express and direct conflict when the conflict appears within the four corners of the majority decisions. Reaves v. State, 485 So. 2d 829, 830 (Fla. 1986). Neither the record

itself nor the dissenting opinion may be used to establish jurisdiction. Id.

Petitioner claims that this Court has jurisdiction under this rule because the decision of the Fifth District Court expressly and directly conflicts with Dobrin v. Department of Highway Safety and Motor Vehicles, 874 So.2d 1171 (Fla. 2004); Department of Highway Safety and Motor Vehicles v. Nelson, 823 So.2d 828 (Fla. 1st DCA 2002); State v. Joy, 637 So. 2d 946 (Fla. 3d DCA 1994); and State v. Eady, 538 So. 2d 96 (Fla. 3d DCA 1989).

Initially, Petitioner contends that the Fifth District's opinion directly conflicts with Dobrin. The Fifth District's opinion states "to justify a warrantless stop an officer must have an articulable, reasonable suspicion that a violation of the law has occurred." (App. A, p. 2). However, as noted in Dobrin, "The correct test to be applied is whether the particular officer who initiated the traffic stop had an objectively reasonable basis for making the stop." Dobrin at 1174. This Court has also stated that "[t]he only concern under the Fourth Amendment is the validity of the basis asserted by the officer involved in the stop." Dobrin at 1173, citing, Whren v. U.S., 517 U.S. 806, 809-10, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996).

The Fifth District's opinion relies upon Brown v. State, 719 So.2d 1243, 1245 (Fla. 5th DCA 1998), which does not address the "objective test" established by Whren, nor Holland v. State, 696 So.2d 757 (Fla.1997), where this Court adopted the Whren test. Here, as in Dobrin<sup>2</sup>, the Fifth District applied the wrong test. The officer in this case asserted a valid basis for the stop of Respondent's vehicle by noting in the charging affidavit his observation that the vehicle was traveling 71 mph in a 45 mph speed limit area.

As noted by the dissenting opinion of Judge Sawaya, the decisions in Joy and Eady are directly on point to the issues raised in this case. (App. A, SAWAYA, J., dissent at p. 9-11). In the Joy case, the Third DCA explained that an officer's lay opinion as to the speed of a vehicle is admissible to show that the stop was founded on a reasonable suspicion, even though such an opinion would be inadmissible to establish that the driver was actually speeding. See Joy, 637 So. 2d at 947. The fact

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<sup>2</sup> This Court held that the circuit court applied the correct law by considering whether the arrest report provided an objective basis to stop Dobrin's vehicle. The circuit court concluded that "the record did not competently or substantially support the officer's stop of Dobrin's vehicle on the basis of speeding because there was no indication in the arrest report that Dobrin was driving in excess of the speed limit, or that the reason for the officer's stop was speeding." Here, conversely, the arrest affidavit specifically states that the officer observed Respondent violate the speed limit by traveling 71 mph in a 45 mph speed limit area and thereafter attempted to "pull him over."

that the patrol car's speedometer in Joy was not calibrated was of no avail to the driver in that case because, as the court explained, an officer may lawfully stop a vehicle suspected of speeding based on the officer's visual and aural perceptions alone. Id. (citing Eady, 538 So.2d 96). This is true even if the officer is unsure of whether the vehicle is actually exceeding the speed limit. See Eady, 538 So.2d at 97. Indeed, "[f]acts constituting probable cause need not meet the standard of conclusiveness and probability required to support a conviction." Seago v. State, 768 So. 2d 498, 500 (Fla. 2d DCA 2000).

In Department of Highway Safety and Motor Vehicles v. Nelson, the First District, in quashing the decision below, noted that Respondent's formal administrative review hearing did not concern his unlawful speed, but rather Petitioner's license suspension for DUI. In Nelson, the circuit court, conducting first-tier review of a driver's administrative license suspension, issued a writ of certiorari because, in the court's opinion, the Department hearing officer erred by not allowing the driver to elicit testimony from the stopping officer concerning the validity of his radar. Quashing the circuit court's order, the First DCA noted that although the stopping officer had testified about the driver's unlawful speed at the

administrative suspension hearing, that proceeding did not concern the driver's unlawful speed, but rather the implied consent law, §322.2615, Florida Statutes. Nelson at 829.

The First DCA observed that the circuit court was under the mistaken impression that the arresting officer should not have been allowed to testify about the driver's speed without laying the proper predicate pursuant to § 316.1905 and § 316.1906, Fla. Stat. Here, the officer lawfully testified, through his sworn arrest affidavit, about Respondent's speed. According to the officer, he "observe[d] [Respondent] violate F.S.S. 316.187(1) by traveling 71 mph in a 45 mph speed limit area." The hearing officer properly admitted and considered the officer's observation of Respondent's speed for the purpose of determining whether the officer had probable cause to stop Respondent's vehicle.

The Fifth District's opinion contravenes the holding of the Third District that an officer's lay opinion is admissible to show that the stop was founded on a reasonable suspicion that the driver was speeding. Instead, the Fifth District held that reasonable suspicion was lacking because of the "limited facts provided in the affidavit." (App. A, p. 3). Here, the officer's visual perception, his **observation**, that Roberts was traveling 71 mph in an area where the speed limit was 45 mph

would meet the test established by Dobrin, Joy and Eady.<sup>3</sup> However, the officer's affidavit is insufficient in the Fifth District because "the officer's report provides little or no specifics about the officer's vantage point when he reached the conclusion that Respondent was speeding." (App. A, p. 3, footnote omitted). Petitioner contends that such a holding contravenes the rulings of Dobrin, Joy, Nelson, and Eady.

The Department submits that the holding of the Fifth District is in express and direct conflict with the holdings of this Court and the First and Third Districts. This conflict appears within the four corners of the majority opinion and should, respectfully, be resolved by this Honorable Court to assure uniformity of application of the law of probable cause to stop a motorist. This is a most important consideration for Petitioner in that Florida Highway Patrol Officers of the Department must receive uniform training and understanding of this aspect of their job.

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<sup>3</sup> The auditory aspect of this case is mirrored in Schwartz v. Department of Highway Safety and Motor Vehicles, 920 So.2d (Fla. 3d DCA 664 (Fla. 3d DCA 2005)). In that case, the officer's arrest affidavit noted he observed the driver "playing his car stereo at excessive volume in violation of FSS." Relying on Dobrin, the Third District held that the arrest affidavit was competent substantial evidence that supported the hearing officer's determination that probable cause existed to support the validity of the stop.

Thus, this Court should exercise its discretionary jurisdiction in this matter to resolve this conflict and thereby maintain uniformity of decisions throughout the state. See Acensio v. State, 497 So. 2d 640 (Fla. 1986) (supreme court found that it had jurisdiction based upon the conflict created by district court of appeal's misapplication of the law). Indeed, the acceptance by this Court of discretionary jurisdiction in this matter would assure uniformity of decisions throughout the state. N & L Auto Parts Co. v. Doman, 117 So.2d 410 (Fla. 1960) ("Our concern is with the decision under review as a legal precedent to the end that conflicts in the body of the law of this State will be reduced to an absolute minimum and that the law announced in the decision of the appellate courts of this State shall be uniform throughout.")

In this case, the principle announced by the majority opinion of the Fifth District conflicts with those principles in other District Courts. Accordingly, Petitioner respectfully requests that this Court accept jurisdiction to hear this matter.

**CONCLUSION**

Based upon the foregoing arguments and cited authorities, the Petitioner respectfully requests that this Honorable Court exercise discretionary jurisdiction in this cause.

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Respondent was mailed to **MICHAEL J. SNURE**, P.O. Box 2728, 1150 Louisiana Avenue, Suite 1, Winter Park, Florida 32789 on September \_\_\_\_, 2006.

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**THOMAS C. MIELKE**  
Assistant Attorney General

**CERTIFICATION OF FONT AND TYPE SIZE**

I HEREBY CERTIFY that the font and type size in this response complies with Fla.R.App.P. requirements in that Courier New Roman 12 point was utilized.

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**THOMAS C. MIELKE**  
Assistant Attorney General

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APPENDIX

Appendix "A" Fifth District's Opinion in case number 5D05-3001  
of March 24, 2006.

**APPENDIX A**