

**Criminal law -- Driving under influence -- Bicycle -- Evidence -- Refusal to submit to breath test -- Because implied consent law does not apply to bicyclists, bicyclist had no duty under implied consent law to submit to breath test, and it would be unfairly prejudicial to admit evidence of refusal of breath test as evidence of bicyclist's consciousness of guilt in DUI prosecution**

STATE OF FLORIDA, vs. LAUBEL SOLIS PEREZ, Defendant. County Court, 20th Judicial Circuit in and for Collier County. Case No. 06-11266-CT-RM. April 18, 2007. Ramiro Mañalich, Judge. Counsel: Jennifer Sam, Assistant State Attorney. Bryan Loeffler, Assistant Public Defender.

*ORDER GRANTING DEFENSE MOTION IN LIMINE*

*TO EXCLUDE FROM TRIAL EVIDENCE OF DEFENDANT'S*

*ALLEGED REFUSAL TO SUBMIT TO A DUI BREATH TEST*

This matter is before the court on Defendant's Motion In Limine to Exclude From Evidence at Trial the Defendant's Alleged Refusal to Submit to a driving under the influence ("DUI") breath test. The court has reviewed the parties' memoranda of law and hereby grants Defendant's motion because the court finds that Section 316.1932(1), Fla. Stat. (the Florida Implied Consent Law), does not apply to DUI cases involving bicycles. The court's analysis appears below.

I. THE LEGISLATIVE INTENT, AS EXPRESSED IN SECTIONS 316.193 AND 316.1932, FLA. STAT., IS TO NOT APPLY THE IMPLIED CONSENT LAW TO BICYCLES.

A. Legislative intent is the polestar of statutory interpretation.

The principal issue in this case is whether the Florida Implied Consent Law (Section 316.1932(1)(a)1.a., Fla. Stat.) applies to a Defendant who is arrested for DUI while driving a bicycle instead of a motor vehicle.<sup>1</sup> The question arises because Section 316.193(1), Fla. Stat., prohibits driving any "vehicle" while impaired by drugs or alcohol, but Section 316.1932(1)(a)1.a., Fla. Stat., establishes implied consent for testing for alcohol and other controlled substances for those who operate a "motor vehicle."

In construing statutes, legislative intent is the polestar that guides a court's statutory construction analysis. *McLean v. State*, 934 So.2d 1248, 1258 (Fla. 2006). Said construction of statutes is a question of law that is to be determined by the court. *Therrien v. State*, 914 So.2d 942, 945 (Fla. 2005). Legislative intent is crucial since it is considered to be the essence and vital force behind the law. *In Re: Ginsberg's Estate*, 50 So.2d 539, 542 (Fla. 1951). Case law also teaches that Florida courts begin statutory construction by looking to the actual language used; if, and only if, the actual language is unclear in the statutes do the Florida Courts explore the legislative history or use rules of statutory construction to determine the legislature's intent in enacting a statute. *Branche v. Air Tran Airways, Inc.*, 314 F. Supp. 2d 1194, 1195 (M.D. Fla. 2004). See also, *Koile v. State*, 934 So.2d 1226, 1230-31 (Fla. 2006). Typically, the words in the statute are the best guide to legislative intent. *State Farm Mutual Auto Insurance Co. v. Nichols*, 932 So.2d 1067, 1076 (Fla. 2006).

B. Florida Statutes and case law regarding bicycles and the Florida DUI laws.

Section 316.193(1)(a)-(c), Fla. Stat., provides as follows:

(1) A person is guilty of the offense of driving under the influence and is subject to punishment as provided in subsection (2) if the person is driving or in actual physical control of a *vehicle* (emphasis added) within this state and:

(a) The person is under the influence of alcoholic beverages, any chemical substance set forth in s. 877.111, or any substance controlled under chapter 893, when affected to the extent that the person's normal faculties are impaired;

(b) The person has a blood-alcohol level of 0.08 or more grams of alcohol per 100 milliliters of blood; or

(c) The person has a breath-alcohol level of 0.08 or more grams of alcohol per 210 liters of breath.

Section 316.1932(1)(a)1.a. provides, in pertinent part, that any person who accepts the privilege to operate a *motor vehicle* within the state is, by so operating such vehicle, deemed to have given his or her consent to submit to an approved chemical test of his or her breath for the purpose of determining the alcoholic content of his or her blood or breath if the person is lawfully arrested for any offense allegedly committed while the person was driving or was in actual physical control of a motor vehicle while under the influence of alcoholic beverages. This section also provides that the refusal to submit to a chemical or physical breath test upon the request of a law enforcement officer as provided in this section is admissible into evidence in any criminal proceeding.<sup>2</sup>

One can see from a comparison of these two statutes that they use different terminology with regard to the modes of transportation that each statute states that it covers. Section 316.193(1) applies to “vehicles” and Section 316.1932(1)(a)1.a. applies to “motor vehicles.” It thus becomes necessary to check the statutory definitions of “vehicles” and “motor vehicles” as the next step in this inquiry. Section 316.003(75), Fla. Stat., defines “vehicle” as “Every device, in, upon, or by which any person or property is or may be transported or drawn upon a highway, excepting devices used exclusively upon stationary rails or tracks.” Section 316.003(21), Fla. Stat., defines “motor vehicle” as “Any self-propelled vehicle not operated upon rails or guideway, *but not including any bicycle* (emphasis added), motorized scooter, electric personal assistive mobility device, or moped.” Section 316.003, Fla. Stat., in its introduction, provides that defined words and phrases, when used in Chapter 316, shall have the meanings respectively ascribed to them in Section 316.003, except where the context otherwise requires.

There is one Florida case that, while not directly on point, is helpful in determining whether the implied consent law applies to bicycles. In *State v. Howard*, 510 So.2d 612 (Fla. 3rd DCA 1987), it was held that Florida's driving under the influence statute, Section 316.193, applies to bicyclists. The 3rd District Court of Appeal reasoned that Section 316.193, Fla. Stat., contemplated applicability to all vehicles since it was not limited to “motor vehicles” as are many of the other statutes dealing with driving under the influence. Said court specifically referenced for comparison Section 316.1932, Fla. Stat., the implied consent law. *Howard* at p. 612. The court went on to add that had the legislature intended to exclude bicyclists from the coverage of Section 316.193, it could have made Section 316.193 applicable only to a “motor vehicle” since that statutory definition excludes bicycles. *Howard* at p. 613. The court further explained as follows:

. . . Since the words used in the statute are clear, we must presume that the legislature meant what it said and purposely chose to make Section 316.193 apply to all vehicles rather than just “motor vehicles”. *C.f. State Farm Mutual Auto Insurance Co. v Kuhn*, 374 So.2d 1079, 1080-81 (Fla. 3rd DCA 1979) (“where words used and grammatical construction employed in a statute are clear and they convey definite meaning, the legislature is presumed to have meant what it said and therefore, it is unnecessary to resort to the rules of statutory construction”), *appeal dismissed*, 383 So.2d 1197 (Fla. 1980). *Howard* at p. 613.

It appears from the statutes and case law cites above that the Florida Legislature has clearly expressed that the impaired driving prohibitions in Section 316.193, Fla. Stat., apply broadly to “vehicles.” On the other hand, the legislature has carefully chosen its language in Section 316.1932(1)(a)1.a., Fla. Stat., to only apply the Implied Consent Law to “motor vehicles” and not to bicycles.

C. Assuming, arguendo, that the DUI statutes are ambiguous, statutory construction does not lead the Court to apply the Implied Consent Law to bicycles.

It is only when statutory intent is unclear from the plain language of the statute that the courts apply rules of statutory construction and explore legislative history to determine legislative intent. *Koile v. State*, 934 So.2d 1226 (Fla. 2006).<sup>3</sup> The State argues that there are ambiguities in the statutes so as to require interpretation of Sections 316.193 and 316.1932, Fla. Stat. The State urges the court to consider additional statutory provisions to clarify the State's perceived ambiguities in the statutes. State's Memorandum of Law at p. 2. In particular, the State points out that Fla. Stat. Section 316.2065(1) provides that bicycles have all of the duties and rights applicable to drivers of other vehicles, except as to special regulations and provisions in Chapter 316, Fla. Stat., which by their nature can have no application. The State's Memorandum of Law at p. 2.<sup>4</sup> The State also argues that a reasonable construction of the DUI and implied consent laws is that the refusal of breath test consequences should apply to bicyclists if they have previously accepted the privilege extended by the laws of the state of operating a motor vehicle (separate and apart from operating a bicycle). State's Memorandum of Law at pp. 2-3. In the case sub judice, the State points out that the defendant is charged with a second DUI and that the prior conviction indicates the Defendant was previously driving a motor vehicle.

Assuming, arguendo, that the State is correct that the DUI statutes are ambiguous, the court finds that a reasonable construction of the Statutes is that the legislative intent was to exclude bicycles from the Implied Consent Law.

It is true that the statutory provisions relating to implied consent should be read in *pari materia* as expressing a unified legislative purpose. *State v. Bodden*, 877 So.2d 680, 686-87 (Fla. 2004). However, *Bodden* also teaches that words in a statute are not to be construed as superfluous if a reasonable construction exists that gives effect to all words. *Bodden* at p. 686.

In considering all of the applicable statutes mentioned above, the court finds that the DUI statutes can be harmonized without changing the plain statutory language in the Implied Consent Law that only applies that section of the statutes to motor vehicles instead of to all vehicles. Specifically, Section 316.1932(1)(a)1.a., Fla. Stat., states clearly and unambiguously that the Implied Consent Law applies only to *motor* vehicles. The other relevant statutory sections (Sections 316.193(1), 316.072(1) and 316.2065(1), Fla. Stat.) apply all of the uniform traffic control and DUI provisions in Chapter 316 to all types of

vehicles as defined or exempted throughout the chapter. The court understands the State's argument that it makes logical sense to subject a bicyclist to breath testing provisions in order to enforce the DUI prohibitions which apply to bicyclists. However, it also makes logical sense that the legislature would choose to not apply breath testing to bicyclists because, as the State concedes, bicyclists do not require a license to operate their form of transportation. State's Memorandum at p. 3. There is thus no bicycle license to be suspended or revoked as a consequence of a refusal of a breath test and there is no license upon which can be displayed the warning which appears on motor vehicle licenses stating "operation of a motor vehicle constitutes consent to any sobriety test required by law." When the language of a statute is clear, reasonable and logical in its operation, the court should not search for excuses to give a different meaning to words used in the statute. 48 A Fla. Jur. 2d Statutes Sec. 110, citing *In Re: Levy's Estate*, 141 So.2d 803, 806 (Fla. 2nd DCA 1962) and *Vocelle v. Knight Bros. Paper Co.*, 118 So.2d 664, 667 (Fla. 1st DCA 1960).

D. The State's desired application of the Implied Consent Law to bicycles must be obtained by legislative enactment.

This is a case where the language of the statute is plain and unambiguous and conveys a clear and definite meaning (the use of the words "motor vehicle" in the Implied Consent Law statute, Section 316.1932(1), Fla. Stat. In such circumstances, it is established law that there is no occasion for resort to the rules of statutory interpretation and to do otherwise would constitute an abrogation of legislative power. The plain and obvious provisions of the statute must control. [\*Starr Tyme, Inc. v. Cohen\*](#), 659 So.2d 1064, 1067 (Fla. 1995), [\*Nicoll v. Baker\*](#), 668 So.2d 989, 990-91 (Fla. 1996), and [\*Holly v. Auld\*](#), 450 So.2d 217, 219 (Fla. 1984). See also, 48 A. Fla. Jur. 2d Statutes Section 110. The application of the implied consent law to bicyclists sought by the State must be obtained by legislative enactment, changing the language of the Implied Consent Statute, instead of by judicial intervention and construction of the statutes.

E. The "Safe Harbor" doctrine regarding breath test refusals does not apply to Defendant's ship (bicycle) as it navigates stormy DUI waters because the ship does not carry a cargo consisting of a statutory duty to take the breath test.

The State's final alternative argument is that even if the court finds that the implied consent law does not apply to bicyclists, the State should still be allowed to introduce evidence of a bicyclist's refusal of a breath test during the DUI trial as relevant evidence pertaining to consciousness of guilt. State's Memorandum at p. 4. The State cites [\*State v. Taylor\*](#), 648 So.2d 701 (Fla. 1995) in support of its position. The court finds that *Taylor* is distinguishable because the defendant in *Taylor* was driving a motor vehicle when he refused the breath test. The *Taylor* defendant was thus subject to the express terms of the Implied Consent Law and could only unsuccessfully argue in that case that the refusal should be excluded because it had been motivated by factors other than guilt and not by the Defendant's belief that refusal constituted a "safe harbor" from the consequences of a DUI arrest. This court does not believe that the *Taylor* analysis applies when there is no underlying legal duty stemming from the Implied Consent Law for the rider of a bicycle to submit to a breath test (i.e., the Implied Consent Law only applies to "motor vehicles"). If there is no duty to submit, then it would be unfairly prejudicial to Defendant for the State to use such a refusal as evidence of consciousness of guilt of the DUI charge by the Defendant riding the bicycle. Section 90.403, Fla. Stat. This is so regardless of whether Defendant had prior knowledge of the potential consequences of a refusal to the status of his motor vehicle license as a result of Defendant's prior arrest for a DUI while driving a motor vehicle.

## II. CONCLUSION

Based on the above analysis, the court concludes that the Implied Consent Law as laid out in Section 316.1932(1)(a)1.a., Fla. Stat., does not apply to bicyclists. Since a bicyclist has no duty under the implied consent law to submit to a breath test, it would be unfairly prejudicial under Section 90.403, Fla. Stat. to admit evidence of the refusal as consciousness of guilt by the bicyclist in a DUI prosecution. This conclusion is supported by a portion of the language of Section 316.1932(1)(a)1.a., Fla. Stat., which states, “. . .The refusal to submit to a chemical or physical breath test upon the request of a law enforcement officer *as provided in this section* (emphasis added) is admissible into evidence in any criminal proceeding.” This section of the statute only applies to “motor vehicles” so the requested breath test of the bicyclist is not “as provided in this section.” The court hereby excludes from evidence in this trial the Defendant bicyclist's alleged refusal to submit to a breath test.

---

<sup>1</sup>There is no dispute that the facts in this case are that the Defendant was arrested for DUI while driving a bicycle. See, Defendant's Motion in Limine and State's Memorandum of Law at page (“p.”) 1.

<sup>2</sup>The full text of Section 316.1932(1)(a)1.a. reads as follows:

Any person who accepts the privilege extended by the laws of this state of operating a *motor vehicle* (emphasis added) within this state is, by so operating such vehicle, deemed to have given his or her consent to submit to an approved chemical test or physical test including, but not limited to, an infrared light test of his or her breath for the purpose of determining the alcoholic content of his or her blood or breath if the person is lawfully arrested for any offense allegedly committed while the person was driving or was in actual physical control of a *motor vehicle* (emphasis added) while under the influence of alcoholic beverages. The chemical or physical breath test must be incidental to a lawful arrest and administered at the request of a law enforcement officer who has reasonable cause to believe such person was driving or was in actual physical control of the motor vehicle within this state while under the influence of alcoholic beverages. The administration of a breath test does not preclude the administration of another type of test. The person shall be told that his or her failure to submit to any lawful test of his or her breath will result in the suspension of the person's privilege to operate a *motor vehicle* (emphasis added) for a period of 1 year for a first refusal, or for a period of 18 months if the driving privilege of such person has been previously suspended as a result of a refusal to submit to such a test or tests, and shall also be told that if he or she refuses to submit to a lawful test of his or her breath and his or her driving privilege has been previously suspended for a prior refusal to submit to a lawful test of his or her breath, urine, or blood, he or she commits a misdemeanor in addition to any other penalties. The refusal to submit to a chemical or physical breath test upon the request of a law enforcement officer as provided in this section is admissible into evidence in any criminal proceeding.

<sup>3</sup>Neither party provided the court with any legislative history concerning F. S. Sections 316.193 or 316.1932.

<sup>4</sup>The court also notes, sua sponte, that Section 316.072(1), Fla. Stat., provides that Chapter 316 applies to the operation of vehicles and bicycles and pedestrians upon all roadways.

\* \* \*