IN THE SUPREME COURT OF FLORIDA

CLIFFORD WAYNE GORDON,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 66,273
66,213

PETITIONER'S BRIEF ON THE MERITS

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

LARRY B. HENDERSON
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SUMMARY OF ARGUMENT

The first certified question asks whether D.W.I. Manslaughter is a possible lesser included offense of second degree murder. It is not, and can never be, because a person may be killed by an act of manslaughter [accidentally through criminal negligence but without malice] or by an act of second degree murder [through an intentional act done with malice], but not both. Because the jury improperly was allowed to find that the one victim was killed in inconsistent, mutually exclusive ways, the matter must be remanded for retrial.

STATEMENT OF THE CASE

Mr. Clifford Gordon was convicted of D.W.I. Manslaughter[1/], Second Degree Murder[2/], and Leaving the Scene of an Accident With Injuries[3/] following a jury trial in the Circuit Court for Marion County, the Honorable Raymond T. McNeal presiding. Mr. Gordon was adjudicated guilty of each offense and sentenced respectively to a fifteen year term of imprisonment, a concurrent life term of imprisonment, and a consecutive one year term of imprisonment (R91-96)[4/].

Upon timely direct appeal to the Fifth District Court of Appeal, the conviction for D.W.I. Manslaughter was vacated (see Appendix "A"). In rendering its decision the Fifth District Court of Appeal certified three questions to be of great public importance, to-wit:

a. IS DWI MANSLAUGHTER A POSSIBLY LESSER INCLUDED OFFENSE OF SECOND DEGREE MURDER?

b. DOES THE DOUBLE JEOPARDY CLAUSE OF FLORIDA'S OR THE UNITED STATES' CONSTITUTIONS BAR CONVICTIONS FOR BOTH OF THESE CRIMES IN A SINGLE CRIMINAL PROSECUTION WHERE THERE WAS ONLY ONE HOMICIDE VICTIM?

c. DOES THE DOUBLE JEOPARDY CLAUSE OF FLORIDA'S OR THE UNITED STATES' CONSTITUTIONS BAR IMPOSITION OF SEPARATE SENTENCES FOR THE CONVICTIONS OF THESE TWO CRIMES RENDERED IN A SINGLE CRIMINAL PROSECUTION, WHERE THERE WAS ONLY ONE HOMICIDE VICTIM?

1/ Violation of Section 860.01(2), Florida Statutes (1981).
2/ Violation of Section 782.04(2), Florida Statutes (1981).
3/ Violation of Section 316.027, Florida Statutes (1981).
4/ (R) refers to the Record on Appeal of the instant cause.

The State initially petitioned this Court to review the instant decision (Sup.Ct. Case No. 66,213). Mr. Gordon thereafter petitioned this Court to review the decision (Sup.Ct. Case No. 66,273). At the instance of Mr. Gordon, without objection by the State, the cases were consolidated by order of this Court dated December 21, 1984. This brief follows.

STATEMENT OF THE FACTS

July 6th was a typically nice summer day in Florida, with the usual afternoon thundershowers that turned the busy highway in Ocala slick with rain (R18,27,30,62). Around two o'clock p.m., several automobiles stopped for a red traffic light on highway 200 just past the Burger King and tragedy struck (R18-19,29-30).

A Chevrolet pick-up truck being driven by Mr. Gordon caused a chain reaction collision when, without braking, it crashed into the rear of a Datsun automobile (R18-19,117). Ms. Janet Kint Hexham was the driver of the vehicle immediately in front of the Datsun, and she quickly emerged from her Corvette after it was struck by the Datsun (R46-48,51,59,63,75,102). She stepped into the middle of the road as if to assess the damage that had occurred to her sports car and, upon becoming aware of the truck approaching truck, raised her hands, and was struck almost instantly by the truck as it accelerated away from the scene of the accident (R46-48,51,59,63,80,102-104,111-112,139). Ms. Hexham died soon thereafter as a result of being run over by the right-side tires of the truck (R131,148-149).

There followed several more traffic accidents as Mr. Gordon's truck changed lanes, until the vehicle finally came to a rest about a half-mile away from where Ms. Hexham was struck (SR13-14)[5/]. Mr. Gordon was at once arrested, and a chemical

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5/ (SR) refers to the Supplemental Record on Appeal filed in this cause on September 2, 1983.

test run upon a sample of his blood disclosed a blood alcohol content of .259% (SR169).

The arresting officer testified that Mr. Gordon appeared to be intoxicated at the time of his arrest; that he was "staggering, swaying about on his feet, having trouble standing. [Mr. Gordon had] a very strong smell about his breath, what appeared to be an alcoholic beverage, and his eyes were bloodshot". (R100). The expert chemist testifying for the State established that a .259% blood alcohol percentage would indicate that the person was intoxicated. The witnesses near enough to observe Mr. Gordon's demeanor consistently testified that he was "expressionless" and in a stuporous-type state (R120,129,138,SR14-15,58-59, 88,96,100).

CERTIFIED QUESTION NUMBER 1

IS D.W.I. MANSLAUGHTER A POSSIBLY LESSER INCLUDED OFFENSE OF SECOND DEGREE MURDER?

It is respectfully submitted that the above-certified question is susceptible to two reasonable interpretations. In Supreme Court Case No. 66,213, the State has taken the position that the question asks whether D.W.I. Manslaughter is a Brown[6/] category IV lesser included offense of Second Degree Murder. For the purpose of this brief, Mr. Gordon contends that the question asks whether D.W.I. Manslaughter can ever possibly be a lesser included offense of Second Degree Murder.

Second degree murder is "[t]he unlawful killing of a human being, when perpetrated by any act imminently dangerous to another and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual". Section 782.04(2), Florida Statutes (1981). "Depravity of mind is an inherent deficiency of moral sense and rectitude". Ramsey v. State, 114 Fla. 766, 154 So. 855 (1934). (emphasis added).

> It is obvious, therefore, that the phrase "evincing a depraved mind regardless of human life", is used in the statute ... denouncing murder in the second degree, was not used in the legal or technical sense of the word "malice" as above defined. The phrase conveys the idea of "malice" in the popular or commonly understood

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6/ Brown v. State, 206 So.2d 377 (Fla. 1968).

> sense of ill will, hatred, spite, an evil intent. It is the malice of the evil motive which the statute makes an ingredient of the crime of murder in the second degree.

Ramsey, id. at 856. (emphasis added).

"Manslaughter", on the other hand, is defined by Black's Law Dictionary as "[t]he unlawful killing of a human being by another without malice, either express or implied. Such may be either voluntarily, upon sudden heat, or involuntarily, but in the commission of some unlawful act". (emphasis added). See Rodriguez v. State, 443 So.2d 286 (Fla. 3d DCA 1983).

These offenses are fundamentally inconsistent because one [Second Degree Murder] expressly contains the element of malice/depravity of mind, whereas the other [D.W.I. Manslaughter] does not.

In Florida, D.W.I. Manslaughter is defined as follows:

> If, however, damage to property or person of another, other than damage resulting in death of any person, is done by said intoxicated person under the influence of intoxicating liquor to such extent as to deprive him of full possession of his normal faculties, by reason of the operation of any of said motor vehicles mentioned herein, he shall be guilty of a misdemeanor of the first degree ..., and if the death of any human being be caused by the operation of a motor vehicle by any person while intoxicated, such person shall be deemed guilty of manslaughter, and on conviction be punished as provided by existing law relating to manslaughter.

Section 860.01(2), Florida Statutes (1981). (emphasis added).

The State alleged the killing of Ms. Hexham by two

statutorily defined crimes that historically contain inconsistent elements. As pointed out in Point I of Mr. Gordon's Answer Brief on the Merits in Case No. 66,213, for double jeopardy purposes, the crimes are factually the same offense. Indeed, it appears that the Florida Legislature, in recognition of the decreased mental acuity of a drunk[7/] person, has determined that when a human being is killed because of the operation of a motor vehicle by an intoxicated person, it is an act of manslaughter.

Careful analysis of this case raises two possibilities, bearing in mind that there must be a cause and effect[8/] in order to justify a conviction.

Said plainly, the State alleged that Mr. Gordon caused the death of Ms. Hexham because he was drunk and drove an automobile. Alternatively, the State alleged that Mr. Gordon intentionally caused the death of Ms. Hexham because he ran over her. The first alleged an act of manslaughter [causing a death by criminal negligence but without malice], the second alleged an act of second degree murder [an act imminently dangerous to another evincing a depraved mind].

The State may allege the commission of a crime in different ways:

7/ cf. State v. Harris, 348 So.2d 283 (Fla. 1977); Ingram v. Pettit, 340 So.2d 922,924 (Fla. 1976), footnote 10.

8/ In Ingram v. Pettit, supra, this Court held that punitive damages may be awarded where voluntary intoxication is involved in an automotive accident without proof of carelessness or abnormal driving, provided that proximate causation is proved. id. at 924.

> ... A defendant in a criminal case is not entitled to an order, as a matter of right, at the commencement of a criminal case, to require the State of Florida to elect between counts of an indictment it will rely upon. Where several counts set forth the same charge in different ways to meet the evidence a different means of commission of the same offense or the same act as different degrees of the same offense, meet the laws requirements.

Austin v. State, 40 So.2d 896 (Fla. 1949).

Fundamental error occurs, however, when the jury is permitted to return guilty verdicts upon each offense.

> The fundamental error in this case was not in charging Muszynski with inconsistent counts, which the State clearly may do, but in submitting to the jury a verdict form which allowed it to return verdicts on inconsistent counts. Fla.R.Crim.P. 3.505.

Muszynski v. State, 392 So.2d 63,64 (Fla. 5th DCA 1981)(footnote omitted).

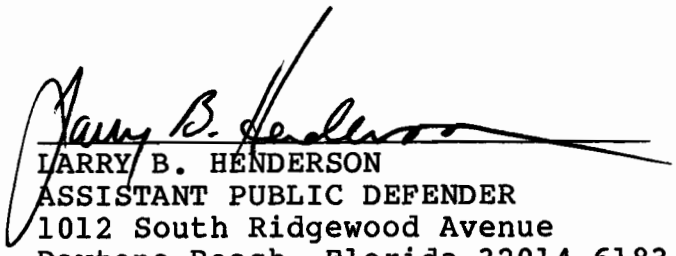
Mr. Gordon respectfully submits that fundamental error has occurred here where the jury was allowed to return inconsistent verdicts. Accordingly, both convictions must be reversed and the matter remanded to the Circuit Court for Marion County for retrial.

CONCLUSION

BASED UPON the argument and authority contained herein, this Court is asked to reverse both convictions and to remand the matter for retrial.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT



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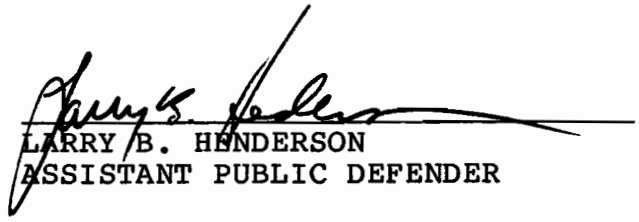
CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true and correct copy of the foregoing has been served upon the Honorable Jim Smith, Attorney General, 125 N. Ridgewood Avenue, Fourth Floor, Daytona Beach, Florida 32014; and mailed to Clifford Wayne Gordon, Inmate No. 088124, Marion Correctional Institute, P.O. Box 158, Lowell, Florida 32663, on this 2nd day of January, 1985.



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