O A 9.9.85 OA 7 reg A

FILED
SID J. WHITE
MAY 22 1985
CLERK, SUPREME COURT
By ________
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

JOSEPH T. SPILLANE,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No: 66,293
4DCA Case No: 83-2295

PETITIONER'S INITIAL BRIEF ON THE MERITS

DOUGLAS N. DUNCAN
Foley, Colton & Duncan, P.A.
406 North Dixie Highway
West Palm Beach, Florida 33401
(305) 832-1744

Counsel for Petitioner Spillane

TABLE OF CONTENTS

	PAGE
TABLE OF CONTENTS	i
AUTHORITIES CITED	ii-iii
PRELIMINARY STATEMENT	1
STATEMENT OF THE CASE	2-4
STATEMENT OF THE FACTS	5-8
POINT INVOLVED	9
ARGUMENT	
POINT I	10-22
WHETHER VEHICULAR HOMICIDE IS A NECESSARILY LESSER-INCLUDED OFFENSE (CATEGORY 1) OF D.W.I. MANSLAUGHTER.	
CONCLUSION	23
CERTIFICATE OF SERVICE	23

AUTHORITIES CITED

	PAGE
Baker v. State (Fla. 1979) 377 So.2d 17	15, 17, 18, 21
Bell v. State (Fla. 1983) 437 So.2d 1057	14
Blockburger v. United States (1932) 284 U.S. 299	14, 17
Borges v. State (Fla. 1982) 415 So.2d 1265	14
Brown v. State (Fla. 1968) 206 So.2d 377	12, 13, 20
Falstreau v. State (Fla. 4th DCA 1976) 326 So.2d 194	22
Grala v. State (Fla. 3d DCA 1982) 414 So.2d 621	21
Griffin v. State (Fla. 4th DCA 1975) 322 So.2d 587	20
Higdon v. State (Fla. 5th DCA 1985) 465 So.2d 1309	10, 21
Houser v. State (Fla. 1st DCA 1984) 456 So.2d 1265	10, 18
Ingram v. Petit (Fla. 1976) 340 So.2d 922	21
In Re: Use by Trial Courts of Standard Jury Instructions in Criminal Cases (Fla. 1981) 431 So.2d 594	13, 19
JAC v. State (Fla. 3d DCA 1979) 374 So.2d 606, Review denied, 383 So.2d 1203 (Fla. 1980)	17, 18
Linehan v. State (Fla. 2d DCA 1983) 422 So.2d 244	19

	PAGE
Mastro v. State (Fla. 2d DCA 1984) 448 So.2d 626	4,10, 18, 19, 20
McCreary v. State (Fla. 1979) 371 So.2d 1024	17
M.C.J. v. State (Fla. 1st DCA 1984) 444 So.2d 1001, cert. denied, 451 So.2d 849 (Fla. 1984)	17
Palmer v. State (Fla. 5th DCA 1984) 451 So.2d 500	17
Ray v. State (Fla. 1981) 403 So.2d 956	18, 20, 22
Smith v. State (Fla. 1979) 378 So.2d 281	16
Spillane v. State (Fla. 4th DCA 1984) 458 So.2d 838	10
State v. Baker (Fla. 1979) 456 So.2d 419	14
Torrence v. State (Fla. 5th DCA 1983) 440 So.2d 392	18
White v. State (Fla. 2d DCA 1982) 412 So.2d 28	18

OTHER AUTHORITY

Florida Statutes	
Section 316.192	21
Section 316.1931(2)(c)	15
Section 782.071	16, 18
Section 860.01(2)	11, 15

PRELIMINARY STATEMENT

The Petitioner was the Defendant in the Criminal Division of the Fifteenth Judicial Circuit, in and for Palm Beach County, Florida, and the Appellant in the Fourth District Court of Appeal for the State of Florida. Respondent was the Prosecution in the trial court, and the Appellee in the Appellate Court. In this Brief, the parties will be referred to by Petitioner and Respondent.

In this Brief, the following symbols will be used:

"R" - Record-on-Appeal
Fourth DCA Case No: 83-2295

All emphasis in this Brief is supplied, unless stated otherwise.

STATEMENT OF THE CASE

The Petitioner was charged by Information on January 21, 1982, with "Manslaughter by an Intoxicated Motorist." (R. 969-970).

The Petitioner entered a plea of not guilty, and the case proceeded to trial by jury before the Honorable Richard Burk on October 3, 1983.

Prior to the admission of any testimony at trial, the Respondent moved in limine to prohibit the Petitioner from going into anything about the victim's background, his activities leading up to the accident in question, arguing that such evidence would be irrelevant in that the crime charged, D.W.I. manslaughter, is a strict liability crime. (R. 188-189). The Petitioner objected to such limitation. (R. 200-201). The trial court granted the Respondent's motion in limine, and ordered the Petitioner that no testimony or evidence should be produced as to the victim's activities leading up to and at the time of the accident. (R. 201).

During the jury charge conference, the Respondent requested that the jury be instructed on the alleged lesser-included offense of vehicular homicide. (R. 810, 883). The Petitioner objected to the giving of vehicular homicide as a lesser-included offense. (R. 813, 863, 891). The Petitioner argued that vehicular homicide was not a lesser-included offense of D.W.I. manslaughter in that vehicular homicide

requires proof of a defendant driver's reckless operation of a motor vehicle, and that such reckless operation was the proximate cause of the victim's death, neither elements which are required for the greater offense of D.W.I. manslaughter. (R. 810). The Petitioner also objected to the giving of vehicular homicide as a lesser-included offense due to the rulings of the trial court precluding him from introducing any evidence of the actions of the victim immediately prior to his death. (R. 811).

Over the Petitioner's objections, the jury was subsequently instructed by the trial court that the lesser-included crime included in the definition of manslaughter by intoxicated motorist is vehicular homicide. (R. 909). The jury was also given a verdict form for vehicular homicide, indicating that such offense was a "lesser-included offense as contained in the Information." (R. 919).

After the jury adjourned to begin their deliberations, the Petitioner renewed all of this objections to the instruction on the lesser-included offense of vehicular homicide. (R. 921).

On October 7, 1983, the jury found the Petitioner guilty of what they had been instructed was a lesser-included offense, vehicular homicide. (R. 930).

On November 9, 1983, the Petitioner was sentenced under sentencing guidelines to probation for a period of five (5) years, with the special condition of probation that the

Petitioner first serve 364 days in the Palm Beach County Jail. (R. 963-964).

ThePetitioner appealed his conviction and sentence for vehicular homicide to the Fourth District Court of Appeal. On appeal, the Petitioner argued that vehicular homicide was not a lesser-included offense of D.W.I. manslaughter. In support of his position, the Petitioner relied upon the case of Mastro v. State, 448 So.2d 66 (Fla. 2d DCA 1984), for its holding that vehicular homicide is not a necessarily lesser-included offense of D.W.I. manslaughter.

On November 7, 1984, the Fourth District Court of Appeal Per Curiam Affirmed the Petitioner's conviction and sentence, but acknowledged that their holding "that vehicular homicide is a lesser-included offense of D.W.I. manslaughter" was in conflict with the Second District's Opinion in Mastro v. State, supra.

On December 5, 1984, the Fourth District denied the Petitioner's Petition for Rehearing. The Petitioner thereafter timely filed his Notice to Invoke Discretionary Jurisdiction with this Court, along with his Jurisdictional Brief outlining the express and direct conflict between the instant case and Mastro v. State, supra.

On April 30, 1985, this Court accepted jurisdiction, with Petitioner's Brief on the Merits to be filed on or before May 20, 1985.

STATEMENT OF THE FACTS

In that the instant appeal concerns the question of whether or not vehicular homicide is a necessarily lesser-included offense of D.W.I. manslaughter, and such question can be resolved, as will be demonstrated, by analysis of the statutory elements required for each offense without regard to the particular facts of the individual case, only a brief recitation of the facts will be provided.

Johnathan Thalor and Anthony Ochiuzzo testified that during the early morning hours of December 31, 1981, they were traveling west on Okeechobee Boulevard, in West Palm Beach, Palm Beach County, Florida. (R. 383, 658). As they were approaching the intersection of the I-95 overpass on Okeechobee Boulevard, the two men observed a car, later identified as being driven by the Petitioner, swerving, speeding, and attempting to pass their car. (R. 385, 658). Mr. Thalor testified that as they were traveling west on Okeechobee Boulevard, he observed an individual walking in the emergency lane on Okeechobee Boulevard. (R. 388). As Thalor and Ochiuzzo continued traveling on Okeechobee Boulevard, they observed the Petitioner's car pass their car on the right, and began traveling in the emergency lane on Okeechobee Boulevard. (R. 388-389). About a second later, according to Thalor, he heard a bang, and realized that something had been hit. (R. 388, 658). Thalor pulled his car over, and he and

Ochiuzzo got out to look for the man that they had observed earlier walking in the emergency lane on Okeechobee Boulevard. (R. 389). They subsequently discovered an individual who looked like he had been hit, and was later identified as Donald Heath. (R. 389, 352). The car that Thalor and Ochiuzzo "heard strike the object" (R. 390), pulled over, and the driver was identified as being the Petitioner. (R. 390-391, 661-662). The Petitioner's car had a broken windshield, (R. 390), and other damage to the front of the car. According to Thalor and Ochiuzzo, the Petitioner appeared and acted drunk. (R. 394, 662, 664).

Law enforcement officers from the West Palm Beach Police Department testified that they responded during the early morning hours of December 31, 1981, to Okeechobee Boulevard and I-95 overpass exit pursuant to a report of an accident. (R. 207, 232, 244-245). The officers spoke with Mr. Thalor and Mr. Ochiuzzo, who also pointed out the Petitioner who had struck Mr. Heath. (R. 522). The Petitioner allegedly advised one of the officers that he had been driving, and that there had been a guy walking in the roadway, but he, the Petitioner, never saw him until it was too late and after he had already struck Mr. Heath. (R. 524). One officer testified that the Petitioner had an odor of alcohol about his person, bloodshot eyes, slurred speech, and difficulty with his balance. (R. 250-251).

The Petitioner was subsequently arrested, and transported to the West Palm Beach Police Department for booking on the charge of manslaughter, and to have a breathalyzer test administered. (R. 459).

After arriving at the West Palm Beach Police Department, the Petitioner was advised of his constitutional rights per Miranda, and of his implied consent rights as follows:

> I advised him that I was prepared to give him an approved chemical test of his breath for the purpose of determining the alcohol content of his blood. I added, you do not have a legal right to refuse the test. If you do refuse the test, your privileges of operating a motor vehicle will be suspended for three (3) months. I asked him if he understood what I told him; he indicated to me that he did. (R. 463).

At the time the breathalyzer test was administered, the test results revealed that the Petitioner had a blood alcohol reading of .15%. (R. 477).

The Petitioner testified in his own behalf. He testified that on the day in question, he had gone to a local restaurant for dinner after work. While there, he ate a cheeseburger, french fries, cole slaw, and consumed two (2) beers. (R. 751-753). Prior to consuming the two (2) beers, the Petitioner testified that he had not had any alcoholic beverages that day. (R. 753). The Petitioner testified that after he had completed his dinner and he was preparing to leave the restaurant, he saw his boss, who invited him back into the restaurant for a drink. The Petitioner testified that he thereafter consumed approximately one and one-half

(1-1/2) scotch and waters. (R. 759). The Petitioner testified that he left the restaurant at approximately midnight, (R. 760), and while driving home, all of a sudden something felt like "just caved in on my front hood". (R. 764). The Petitioner testified that after that occurred, he pulled over, and saw a body on the ground. (R. 767). He testified that after seeing the body, and the condition that it was in, he fainted as he could not stand the sight of blood. (R. 767-769). The Petitioner testified that he was not drunk nor impaired the night of the accident. (R. 778).

Ronald Martin testified on behalf of the Petitioner. He testified that he had been with the Petitioner at a restaurant the night of the accident, and while there, the Petitioner had two (2) drinks with him. Mr. Martin testified that the Petitioner left the restaurant around 12:00 midnight, and at that time the Petitioner was not intoxicated. (R. 731, 732, 734).

Father Martin Juroh testified that the Petitioner enjoys a reputation for honesty in the community, and also a reputation for being a sober individual. (R. 722).

POINT INVOLVED

POINT I

WHETHER VEHICULAR HOMICIDE IS A NECESSARILY LESSER-INCLUDED OFFENSE (CATEGORY 1) OF D.W.I. MANSLAUGHTER.

POINT I

VEHICULAR HOMICIDE IS NOT A NECESSARILY LESSER INCLUDED OFFENSE OF D.W.I. MANSLAUGHTER.

The issue presented herein is whether vehicular homicide is a lesser-included offense of D.W.I. manslaughter, particularly a "Category 1, necessarily lesser-included offense" of D.W.I. manslaughter. The First and Second District Courts of Appeal have held that vehicular homicide is not a necessarily lesser-included offense of D.W.I. manslaughter. Houser v. State, 456 So.2d 1265 (Fla. 1st DCA 1984); Mastro v. State, 448 So.2d 626 (Fla. 2d DCA 1984). On the other hand, the Fourth (the instant case) and Fifth District Courts of Appeal have held that vehicular homicide is a necessarily lesser-included offense of D.W.I. manslaughter. Spillane v. State, 458 So.2d 838 (Fla. 4th DCA 1984); Higdon v. State, 465 So.2d 1309 (Fla. 5th DCA 1985).[1]

Accordingly, the District Courts of Appeal in the State of Florida are in conflict as to whether or not vehicular homicide is a necessarily lesser-included offense of D.W.I. manslaughter, and consequently whether the Schedule of Lesser-Included Offenses adopted by this Honorable Court is correct by designating that vehicular homicide is a neces-

---

[1] The Fifth District in Higdon v. State, certified the question of whether the Schedule of Lesser-Included Offenses promulgated by this Honorable Court erroneously classifies vehicular homicide as a necessarily lesser-included offense of D.W.I. manslaughter as a question of great public importance. The Higdon case is presently pending before this Honorable Court on that question.

sarily lesser-included offense of D.W.I. manslaughter.

A review of the applicable Florida case law demonstrates that vehicular homicide is not a "Category 1", necessarily lesser-included offense of D.W.I. manslaughter. Accordingly, it was error in the instant case for the trial court to have instructed the jury, over the Petitioner's objections, that vehicular homicide was a lesser-included offense upon which the jury could return a conviction.

The Petitioner was charged in the instant case by Information with D.W.I. manslaughter, which stated:

> JOSEPH THEODORE SPILLANE, in the County of Palm Beach in the State of Florida, on the 31st day of December, in the year of our Lord, one thousand nine hundred eighty-one in the County and State aforesaid, did unlawfully drive or operate a motor vehicle over the highways, streets, thoroughfares of Florida while he was in an intoxicated condition or under the influence of intoxicating liquor to such an extent as to deprive him of full possession of his normal faculties, and further, by virtue of the operation of said motor vehicle and said conditions, said JOSEPH THEODORE SPILLANE did cause the death of a human being, to-wit: Donald Heath, contrary to F.S. §860.01. (R. 969).

During the jury charge conference, the Respondent requested that the jury be instructed on vehicular homicide, contending that such offense was a lesser-included offense of D.W.I. manslaughter. (R. 804, 810, 883). The Petitioner objected to the jury being instructed that vehicular homicide is a lesser-included offense of D.W.I. manslaughter. The

Petitioner argued that D.W.I. manslaughter is a strict liability type crime, requiring no proof of a defendant's reckless operation of a motor vehicle, nor proof of proximate causation between the reckless operation and resulting death of a human being. (R. 810, 813, 863, 891). Furthermore, the Petitioner objected to an instruction on vehicular homicide being submitted to the jury for their consideration as a lesser-included offense in that the trial court had specifically precluded the Petitioner from introducing any evidence of the decedent's own possible negligence contributing to the accident. (R. 201, 811).

The trial court acknowledged that it had precluded the Petitioner from presenting any evidence of the decedent's negligence, which the court further acknowledged would have been relevant and admissible evidence as to the issue of proximate causation in defending against the charge of vehicular homicide. (R. 869, 872). Nonetheless, the trial court overruled the Petitioner's objections, and instructed the jury that vehicular homicide was a lesser-included offense of D.W.I. manslaughter. (R. 891, 909, 918-919).

The jury subsequently found the Petitioner guilty of vehicular homicide. (R. 930).

Turning to the applicable Florida case law, in Brown v. State, 206 So.2d 377 (Fla. 1968), this Honorable Court identified four (4) categories of lesser-included offenses. In

1981, this Court, in approving new standard jury instructions and the Schedule of Lesser-Included Offenses, renumbered and reduced the Brown categories to two (2):

> Category 1: Offenses necessarily included in the offense charged, which will include some lesser degrees of offenses; and
>
> Category 2: Offenses which may or may not be included in the offense charged, depending on the accusatory pleading and evidence, which includes all attempts and some lesser degrees of offenses.
>
> In Re: Use by Trial Courts of the Standard Jury Instructions in Criminal Cases, 431 So.2d 594, 596-597 (Fla. 1981).

In reference to what constitutes a Category 1, "necessarily lesser-included offense", this Court in Brown v. State, supra, at 382-383, stated:

> [T]his Category also stems from Section 919.16, which requires an instruction on "any offense which is necessarily included in the offense charged." The statutory mandate here requires that the lesser offense be necessarily included in the major offense charged by the accusatory pleading. This simply means that the lesser offense must be an essential aspect of the major offense. In other words, the burden of proof of the major crime cannot be discharged without proving the lesser crime as an essential link in the chain of evidence. For example, in order to prove a robbery, the State must necessarily prove a larceny as an essential element of the major offense. This is so because every robbery necessarily includes a larceny. It is legally impossible to prove a robbery without also proving a larceny. (emphasis added).

More recently, this Court has been called upon to define what is a necessarily lesser-included offense for purposes of double jeopardy. In Borges v. State, 415 So.2d 1265 (Fla. 1982), this Court rejected the argument that the determination of a lesser-included offense should focus on the "variables of evidentiary proof." Instead, this Court has apparently adopted the "Blockburger test"[2], which provides that the focus of inquiry is the statutory elements of each offense:

> A less serious offense is included in a more serious one if all the elements required to be proven to establish the former are also required to be proven, along with more to establish the latter. If each offense requires proof of an element that the other does not, the offenses are separate and discrete, and one is not included in the other. Borges v. State, supra, at 1267. See, also, Bell v. State, 437 So.2d 1057, 1058 (Fla. 1983); State v. Baker, 456 So.2d 419 (Fla. 1984).

Therefore, applying the principles set forth in the above cited cases, one must look at and compare the constituent essential elements of each offense and simply ask, "Is is necessary in order to prove D.W.I. manslaughter, that vehicular homicide must necessarily be proved?" The answer is clearly no.

The statutory elements of D.W.I. manslaughter, F.S.

---

2 Blockburger v. United States, 284 U.S. 299 (1932).

§316.1931(2)(c)[3], are:

(1) Victim is dead;

(2) the death was caused by the operation of a motor vehicle by the defendant;

(3) the defendant was intoxicated at the time he operated the motor vehicle.

In Baker v. State, 377 So.2d 17 (Fla. 1979), the most exhaustive analysis of our D.W.I. manslaughter statute, and guide to what elements must be proven to sustain a conviction, this Court held that neither negligence nor proximate causation were elements of D.W.I. manslaughter. This Court held that the statutory language "caused by operation of a motor vehicle by any person intoxicated" does not require the State to establish a causal connection between the intoxication and the death. Specifically, that the State is not required to establish that as a result of the driver's intoxication, a motor vehicle was operated in a faulty fashion with the direct result that a death occurred.

Perhaps Justice Boyd in his dissenting Opinion in Baker, supra, at 21, best summarized the proof requirements of our D.W.I. manslaughter statute:

> The D.W.I. manslaughter statute, as construed by the majority, provides that if a person operates a motor vehicle while intoxicated, and the motor vehicle is involved in a collision resulting in the

---

[3] Effective July 1, 1982, D.W.I. manslaughter was renumbered, and is now transferred from F.S., §860.01(2).

> death of another, even if there is no causal connection between the intoxication and the collision, and even if the defendant's actual operation of the vehicle is in no way faulty, he is nevertheless guilty of manslaughter, and can be imprisoned for up to fifteen years.
>
> [Under this law, D.W.I. manslaughter, as construed by the Court today, the following application is possible. An intoxicated person drives an automobile to an intersection and properly stops at a stop light. While there in a stationary position, the vehicle is struck from behind by another automobile due to negligent operation by that driver. The negligent driver dies from injuries received in the collision. The completely passive, non-negligent but intoxicated motorist can be convicted of D.W.I. manslaughter.]

Florida's D.W.I. manslaughter statute is therefore a strict liability crime, for which negligence nor causation is an element required to be established. Smith v. State, 378 So.2d 281 (Fla. 1979).

The statutory elements required for vehicular homicide, F.S., §782.071, are:

> (1) the victim is dead;
>
> (2) the death was caused by the operation of a motor vehicle by the defendant;
>
> (3) the defendant operated the motor vehicle in a reckless manner likely to cause the death of or great bodily harm to another person.

In contrast to D.W.I. manslaughter, case law demonstrates that vehicular homicide requires affirmative proof of the defendant driver's reckless operation of a motor vehicle, and that such operation proximately caused the death of

another. McCreary v. State, 371 So.2d 1024 (Fla. 1979); Palmer v. State, 451 So.2d 500 (Fla. 5th DCA 1984); M.C.J. v. State, 444 So.2d 1001 (Fla. 1st DCA 1984); JAC v. State, 374 So.2d 606 (Fla. 3d DCA 1979), review denied, 383 So.2d 1203 (Fla. 1980).

Consequently, based upon the strict Blockburger analysis of the statutory elements of D.W.I. manslaughter and vehicular homicide, it is clear that vehicular homicide cannot be a necessarily lesser-included offense (Category 1) of D.W.I. manslaughter. As noted above, vehicular homicide requires that a defendant driver operate a motor vehicle in a reckless manner likely to cause the death of or great bodily harm to another, and that there be a causal relationship between the reckless operation of the vehicle, and the victim's death. On the other hand, neither reckless operation nor proximate cause is an element of the crime of D.W.I. manslaughter as that crime has been interpreted and construed by this Court in Baker v. State, supra.[4] In prosecution for D.W.I. manslaughter, it is not necessary for the State to establish that the defendant driver's intoxication caused the death of another. As this Court noted in Baker, D.W.I. manslaughter

---

[4] Petitioner acknowledges should this Court reverse its position set forth in Baker that neither negligence nor proximate cause are elements of D.W.I. manslaughter, then a different result would be mandated herein.

is a strict liability crime, and simply requires a defendant driver to be intoxicated.

Thus, the First District in Houser v. State, supra, and the Second District in Mastro v. State, supra, correctly concluded that vehicular homicide is not a necessarily lesser-included offense of D.W.I. manslaughter. In Mastro, the Second District held that:

> All of the elements of a Category 1, lesser-included offense must be elements of the greater offense. See, White v. State, 412 So.2d 28 (Fla. 2d DCA 1982). Vehicular homicide, a violation of §782.071, Florida Statutes (1981), requires proof that the defendant's reckless behavior caused the death for which he is charged. See, e.g., JAC v. State, 374 So.2d 606 (Fla. 3d DCA 1979). However, conviction for D.W.I. manslaughter apparently does not require proof that the defendant's negligent behavior caused the death. See, Baker v. State, 377 So.2d 17 (Fla. 1979). Thus, vehicular homicide requires proof of an element of causation that the greater offense of D.W.I. manslaughter does not require. Accordingly, vehicular homicide is not a Category 1, lesser-included offense of D.W.I. manslaughter. Id., at 627.

The Petitioner acknowledges that vehicular homicide has been designated as a "Category 1", necessarily lesser-included offense in the Schedule of Lesser-Included Offenses. Although the Schedule is presumptively correct and complete, Ray v. State, 403 So.2d 956, 961, n.7 (Fla. 1981); Torrence v. State, 440 So.2d 392, 393, n.3 (Fla. 5th DCA 1983), it is

not binding. Mastro v. State, supra, at 627; Linehan v. State, 422 So.2d 244 (Fla. 2d DCA 1983). Furthermore, when this Court released the Schedule of Lesser-Included Offenses, a cautionary instruction was included:

> The Court recognizes that the initial determination of the applicable substantive law in each individual case should be made by the trial judge. Similarly, the Court recognizes that no approval of these instructions by the Court could relieve the trial judge of his responsibility under the law to charge the jury properly and correctly in each case as it comes before him.
>
> In Re: Use by Trial Courts of the Standard Jury Instructions In Criminal Cases, supra.

Consequently, because the Schedule of Lesser-Included Offenses was never intended to be paramount to the existing law, and because the analysis of the statutory elements of D.W.I. manslaughter and vehicular homicide establishes that vehicular homicide cannot be a necessarily lesser-included offense of D.W.I. manslaughter, the Schedule of Lesser-Included Offenses should be corrected by omitting vehicular homicide as a Category 1, lesser-included offense of D.W.I. manslaughter.

At the outset herein, Petitioner noted that there are now two (2) categories of lesser-included offenses. As argued, vehicular homicide can never qualify as a "Category 1", lesser-included offense of D.W.I. manslaughter. However, as held by the Second District in Mastro v. State, supra, at 627, vehicular homicide may qualify as a "Category 2", lesser-included offense of D.W.I. manslaughter.

In order to qualify as a "Category 2", lesser-included offense, the Information charging the greater offense must allege all of the elements of the lesser offense, and the proof produced at trial must support the allegation of the lesser offense. Brown v. State, supra, at 383; Mastro v. State, supra, at 627.

In the instant case, the Petitioner was charged by Information with D.W.I manslaughter. A close examination of the charging document reveals no allegations concerning the essential element required for vehicular homicide, i.e., reckless operation of a motor vehicle. (R. 969-970)[5]

A person called upon to respond to criminal charges has the fundamental right to be notified by the accusatory pleading of all offenses for which he may be convicted. Griffin v. State, 322 So.2d 587, 588 (Fla. 4th DCA 1975); See, also, Ray v. State, supra. In Brown v. State, supra, at 383, this Court stated: "[W]e are confronted by the organic requirement that the accusatory pleading apprise the defendant of all offenses of which he may be convicted."

Sub judice, the allegation of being "intoxicated" does not sufficiently apprise the Petitioner that he will be

---

[5] It is apparent that the Fourth District in the instant case also concluded that the Information did not sufficiently set forth the element of recklessness so as to justify the instruction on vehicular homicide as a "Category 2", lesser-included offense. This is best evidenced by the Fourth District's acknowledgement of conflict with the Second District's holding in Mastro v. State, supra, that vehicular homicide is not a necessarily lesser-included offense of D.W.I. manslaughter.

prosecuted not only upon the issue of whether or not he was intoxicated at the time, but also upon the issue of whether or not he operated his motor vehicle in a reckless manner likely to cause great bodily harm or death to another. "While becoming intoxicated might be a reckless act in itself, it is not reckless operation of a motor vehicle; they are two different acts." Higdon v. State, 465 So.2d 1309, 1313 (Fla. 5th DCA 1985) (Dauksch, J., dissenting)[6]. Furthermore, as noted by Justice Boyd in his dissenting Opinion in Baker v. State, supra, at 21, one can clearly operate a motor vehicle in a non-reckless manner while extremely intoxicated, and be convicted and imprisoned for D.W.I. manslaughter. On the other hand, proof of recklessness in the operation of a motor vehicle requires some willful and wanton driving behavior. See, F.S. §316.192.

The Petitioner acknowledges that evidence of intoxication is relevant evidence as to the issue of reckless operation. Grala v. State, 414 So.2d 621 (Fla. 3d DCA 1982). However, there remains the Petitioner's fundamental due process right to notice of the crimes he is to defend against.

---

[6] The Petitioner also acknowledges this Court's Opinion in Ingram v. Petit, 340 So.2d 922 (Fla. 1976), that driving while intoxicated would indicate a reckless attitude. However, attitude and operation are different acts as commented by Judge Dauksch.

In conclusion, the Petitioner stands convicted of vehicular homicide, a crime for which he was not charged, and which, based upon the authorities and arguments above, is not a lesser-included offense of D.W.I. manslaughter. In Ray v. State, supra, this Court noted that a conviction of a crime for which the defendant was not charged, and which is not a permissible lesser-included offense of the crime charged, requires the conviction and sentence be vacated, and the defendant discharged if a proper and timely objection is made by the defendant to the alleged lesser-included offense. See, also, Falstreau v. State, 326 So.2d 194 (Fla. 4th DCA 1976). The Petitioner vehemently objected to the trial court instructing the jury on vehicular homicide at all relevant stages. (R. 813, 863, 891, 921).

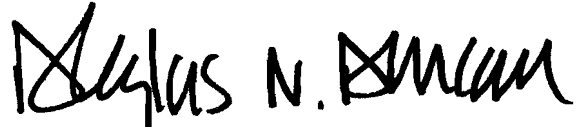
The First and Second District Courts of Appeal have correctly held that vehicular homicide is not a necessarily lesser-included offense of D.W.I. manslaughter. These decisions are in conformity with the existing applicable Florida case law . This Court is respectfully requested to adopt the reasoning of these appellate courts, and in so doing, reverse the Fourth District's holding in the instant case that vehicular homicide is a lesser-included offense. In addition, this Court is requested to order that the Petitioner be discharged.

CONCLUSION

Based on the foregoing arguments and authorities cited, Petitioner SPILLANE respectfully requests this Court to reverse the Fourth District's Opinion, order that the Petitioner be discharged from further prosecution, and amend the Schedule of Lesser-Included Offenses, deleting vehicular homicide as a "Category 1", necessarily lesser-included offense of D.W.I. manslaughter.

Respectfully submitted,

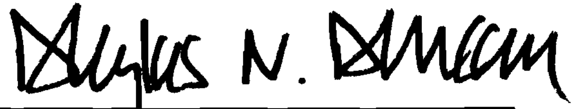
FOLEY, COLTON & DUNCAN, P.A.
Attorney for Petitioner
406 North Dixie Highway
West Palm Beach, FL 33401
Telephone: (305) 832-1744



DOUGLAS N. DUNCAN

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished this 20 day of May, 1985, by U.S. Mail, to Robert Teitler, Esquire, 111 Georgia Avenue, Room 204, West Palm Beach, Florida.



DOUGLAS N. DUNCAN