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IN THE SUPREME COURT OF FLORIDA

JOSEPH T. SPILLANE,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 66,293
(4DCA Case No. 83-2295)

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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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 AND FACTS

Respondent accepts Petitioner's statement of the case and his statement of the facts to the extent that they present an accurate, non-argumentative recitation of proceedings in the trial court.

POINT ON APPEAL

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

SUMMARY ARGUMENT

Respondent maintains that the trial court properly instructed the jury that vehicular homicide §782.071 was a category 1 necessarily lesser included offense of D.W.I. Manslaughter §860.01(2), in accordance with the directives of the schedule of lesser included offenses in the Florida Standard Jury Instructions as set forth by this Court.

In support thereof, Respondent maintains that, albeit a strict liability statute, pursuant to §860.01 the operation of an automobile while under the influence of alcohol to the extent as to deprive one of full possession of his normal faculties is a malum in se act, is per se, and inherently, reckless behavior. This premise is clearly acknowledged in Baker v. State, infra, though the strict liability nature of §860.01 is approved in Baker, infra, on deterrence grounds. Being that negligence or recklessness is inherent in operating a motor vehicle while intoxicated, the required proof in §860.01(2), that the defendant was intoxicated at the time he operated the vehicle, is the same as the required proof in vehicular homicide, that the defendant operated the vehicle in a reckless manner. As such, the recklessness of vehicular homicide is an essential aspect of §860.01 D.W.I. manslaughter, and, in that regard, vehicular homicide fulfills the Borges, infra, and Brown, infra, test as a necessarily lesser included offense of D.W.I. manslaughter.

ARGUMENT

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

The issue presented herein is whether vehicular homicide, §782.071 Fla.Stat. (1981), is a necessarily lesser included offense (Category 1) of D.W.I. manslaughter §860.01(2) Fla. Stat. (1981)(now §316.1931(2) Fla.Stat. (1983)).

The Petitioner was charged with Manslaughter by Intoxicated Motorist, in that he:

> did unlawfully drive or operate a motor vehicle over the highways, streets or thoroghfares 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 in said condition said JOSEPH THEODORE SPILLANE did cause the death of a human being, to-wit: DONALD HEATH, contrary to Florida Statute 860.01. (R 969).

Section 860.01(2) Fla.Stat. (1981), D.W.I. Manslaughter, as charged, states:

> (2) 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 vehicles mentioned herein, he shall be guilty of a misdemeanor of the first degree, punishable as provided in

> s. 775.082 or s. 775.083, 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. (emphasis added).

A conviction of D.W.I. Manslaughter under §860.01(2) therefore requires direct proof that a death occurred, that the death resulted from operation of a vehicle by the defendant, and that the defendant was intoxicated at the time he operated the vehicle. Baker v. State, 377 So.2d 17 (Fla. 1979).

Pursuant to the Florida Standard Jury Instructions In Criminal Cases, 1981 Edition, this Court adopted a schedule of lesser included offenses which specifically lists vehicular homicide as a Category 1 lesser included offense of D.W.I. Manslaughter.

CHARGED OFFENSES	CATEGORY 1	CATEGORY 2
Driving automobile while intoxicated causing death 860.01(2)	860.01(1) or 316.193 782.071	None

(Standard Instructions, page 272).

The jury in the case at bar was so instructed as to the lesser included offense, vehicular homicide, and subsequently convicted Petitioner of that offense. Section 782.071 Fla.Stat. (1981) defines vehicular homicide as:

> "Vehicular homicide" is the killing of a human being by the operation of a motor vehicle by another in a reckless manner likely to cause the death of, or great bodily harm to,

> another. Vehicular homicide is a felony of the third degree, punishable as provided in s. 775.082 s. 775.083, or s. 775.084.

A conviction under the vehicular homicide statute requires proof of the death of a human being by the operation of a motor vehicle in a reckless manner likely to cause the death of, or great bodily harm to, another. McCreary v. State, 371 So. 2d 1024 (Fla. 1979).

In the case at bar, Respondent maintains that the trial court properly instructed the jury that vehicular homicide §782.071 was a necessarily lesser included offense of D.W.I. Manslaughter §860.01(2), in accordance with the directives of the Florida Standard Jury Instructions as set forth by this Court. As held by this Court in Matter of Use By Tr. Cts. of Stand.Jury Inst., 431 So.2d 594, 597 (Fla. 1981), "The schedule of lesser included offenses is designed to be as complete a listing as possible for each criminal offense ... this schedule will be an authoritative compilation upon which a trial judge should be able to confidently rely." The trial court herein so relied (R 178-9, 194-5). Further, as held by this Court in Ray v. State, 403 So.2d 956, 961 n. 7 (Fla. 1981), the schedule of lesser included offenses "... is presumptively correct and complete, and the Court expects that using the schedule will lessen the confusion surrounding lesser included offenses." The Fifth District Court of Appeal, in Higdon v. State, 465 So.2d 1309 (Fla. 5th DCA 1985), pro-

perly accorded deference to this presumption in holding that vehicular homicide was a lesser included offense of D.W.I. manslaughter.

Respondent will now proceed with analysis for the justification of this Court's determination that vehicular homicide should be deemed a Category 1 lesser included offense of D.W.I. Manslaughter. It is evident that vehicular homicide requires that the defendant operate a motor vehicle in a reckless manner and that there be a causal relationship between that recklessness and the victim's death, while, neither reckless operation nor proximate cause is an overt element of the crime of D.W.I. manslaughter. As such, based upon a "strict" Blockburger[1] analysis of the statutory elements of the two offenses, it would seem that vehicular homicide would not be a necessarily lesser included offense of D.W.I. manslaughter. Higdon, supra; see Borges v. State, 415 So.2d 1265 (Fla. 1982). But, Respondent maintains that, albeit a strict liability statute, pursuant to §860.01 the operation of an automobile while under the influence of alcohol to the extent as to deprive one of full possession of his normal faculties is a malum in se act, which is per se, and inherently, reckless behavior; and, as such, allows for vehicular homicide to be a necessarily lesser included offense thereto. This inherent element of reck-

[1] Blockburger v. United States, 284 U.S. 299, 52 S.Ct 180, 76 L.Ed.2d 306 (1932).

lessness or negligence in §860.01(2) is evident from analysis of Baker, supra, and other pronouncements of this Court.[2]

In Baker, supra, this Court construed the strict liability D.W.I. manslaughter statute by quoting its earlier analysis and pronouncement in Roddenberry v. State, 152 Fla. 197, 11 So.2d 582 (1942):

> The primary offense denounced by the statute is the operation of an automobile by an intoxicated person and there are different degrees of punishment which may be meted out to the defendant dependent on the injury resulting to person or property. The most severe is the one which may be imposed where death results but there is no burden upon the state to prove that at the time of the incident the defendant was negligent. That element is established if it be shown that he was not, at the time, in possession of his faculties due to the voluntary use of intoxicants.

In view of what was written by

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[2] Ingram v. Pettit, 340 So.2d 922, 924 (Fla. 1976) ("We affirmatively hold that the voluntary act of driving 'while intoxicated' evinces, without more, a sufficiently reckless attitude ...[a]s used in this opinion, the term 'intoxicated' is identical to the degree of intoxication required in Section 860.01 ...".).

Filmon v. State, 336 So.2d 586, 590 (Fla. 1976) ("... persons under the influence of alcohol to any considerable degree, though not actually intoxicated, are more apt to be heedless, reckless, and daring than when free from such influence.")

Smith v. City of Gainesville, 93 So.2d 105, 106 (Fla. 1957) ("It would appear to us to be utterly absurd to hold that a man should be allowed to fill his automobile tank with gasoline and his personal tank with alcohol and weave his merry way over the public highways without fear of retribution should disaster ensue, as it so often does. The millions who lawfully use the highways are entitled to protection against the potential tragedy ever lurking, inherent in this type of law breaking." (emphasis added).

> the court in Cannon v. State, 91 Fla. 214, 107 So. 360, the negligence occurred at the time the driver, drunken to the extent named in the statute, entered the vehicle and proceeded to operate it and that negligence attached at the time the collision occurred, resulting in the death for which the defendant was placed on trial. It was not necessary to show that there was additional negligence when the collision occurred and no error was committed on the part of the court when he referred in his charges to a "collision" and did not place upon the state the burden of establishing beyond a reasonable doubt that there was some further wrongdoing on the part of the defendant before conviction would be warranted. The provision of the statute with reference to the death of a person being "caused" by the operation of the car is the equivalent of stating that death resulted from his misconduct which had its inception at the time he took control of the car and proceeded to operate it while not in possession of his faculties.
>
> Baker, supra at 18-19, citing Roddenberry, supra at 584-85.

This analysis reveals that in §860.01(2) the element of a defendant's negligence is established if it is shown that he was not, at the time, in possession of his faculties due to the voluntary use of intoxicants. Negligence occurs at the time the intoxicated driver enters the vehicle and proceeds to operate it, and that negligence attaches at the time the collusion occurs - it is not necessary to show additional negligence or further wrongdoing on the part of the defendant when

the collision occurs.[3] Baker, supra. The Roddenberry Court further held that the word "caused" in §860.01(2)[4] is the equivalent of stating that the death resulted from the defendant's misconduct which began when he took control and operated the car while not in possession of his faculties. Baker, supra.

Examination of the evidence adduced at trial in the case at bar revealed that the Petitioner consumed two beers (R 753) and one and a half scotch and waters (R 758-759), got into his car, was observed swerving and speeding as he operated it (R 385, 658), he passed a car on the right and began traveling in an emergency lane where he struck the pedestrian victim (R 388-389). Petitioner was thereafter observed by a police officer as having an odor of alcohol about his person, bloodshot eyes, slurred speech, and difficulty with his balance (R 250-251). At the time the breathalyzer test was administered, the test results revealed Petitioner's blood alcohol content at .15% (R 477). The totality of the circumstances was sufficient to demonstrate that a death occurred from the intoxicated Petitioner's operation of a vehicle in a reckless manner, and, as such, the evidence was sufficient to support the conviction for the lesser included vehicular homicide.[5]

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[3] In that regard, the contributory negligence of the victim, that which Petitioner wished to adduce, was irrelevant.

[4] "... and if the death of any human being be caused by the operation of a motor vehicle by any person while intoxicated ..."

[5] In any event, as a category 1 lesser included offense of the

In Baker, supra at 20, this Court recognized that "... the operation of a motor vehicle while intoxicated is a reckless (and therefore culpable) act ...". In doing so, this Court acknowledged that the element of §860.01(2) D.W.I. manslaughter, that the defendant be intoxicated at the time he operated the vehicle, inherently involved the vehicular homicide element that the defendant operated the vehicle in a reckless manner. As such, the recklessness of vehicular homicide is "an essential aspect" of D.W.I. manslaughter. See Brown v. State, 206 So.2d 377, 281-2 (Fla. 1968). The legislative intent behind §860.01(2) to be a strict liability offense, without requiring proof of negligence, was simply for such legislation to operate as a deterrent to those who create a recognized and serious social problem. Baker, supra. Further, §860.01 reflects malum in se conduct, which is "... inherently and essentially evil ...",[6] and justifies the imposition of strict criminal liability. Baker, supra. Therefore, while recklessness or negligence is not an express element of §860.01(2) to be proven, in order to bolster the statute's deterrent quality, it remains

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[5] (cont.) charged offense of D.W.I. manslaughter, the jury could have properly exercised its jury pardon power in so convicting Petitioner of vehicular homicide. See Bailey v. State, 224 So.2d 296 (Fla. 1969). As such, the trial court did not err in precluding Petitioner from adducing evidence on the victim's contributory negligence since the charged offense, D.W.I. manslaughter, was a strict liability offense, albeit vehicular homicide was a lesser included offense of which Petitioner could be convicted.

[6] BLACK'S LAW DICTIONARY 865 (5th ed. 1979).

an acknowledged inherent aspect, or evil, in operating an automobile while intoxicated, and is, as such, an element of both vehicular homicide and D.W.I. manslaughter. The strict liability of D.W.I. manslaughter does not detract the reckless aspects or nature of the offense.

Being that negligence or recklessness is inherent in operating a motor vehicle while intoxicated, the required proof in §860.01(2), that the defendant was intoxicated at the time he operated the vehicle, is the same as the required proof in vehicular homicide, that the defendant operated the vehicle in a reckless manner. Albeit based upon a "strict" Blockburger analysis the lesser included argument seems to fail, see Higdon, supra, closer analysis reveals that both vehicular homicide and §860.01(2) D.W.I. manslaughter do require proof of recklessness, because, in proving the D.W.I. manslaughter element that the defendant was intoxicated at the time he operated the vehicle, the prosecution has as well proven the defendant's recklessness. In this regard, Borges, supra, is satisfied because the recklessness element of the lesser included offense of vehicular homicide is an inherently proved element of the greater offense of D.W.I. manslaughter. Hence, it is necessary to prove vehicular homicide in order to prove D.W.I. manslaughter; the elements required to be proven to establish vehicular homicide are also required to be proven, along with more, to establish D.W.I. manslaughter. See Borges, supra.

The legislative intent, and public policy, of punish-

ing drunk drivers, is not served by the restrictive interpretation of §860.01(2) and the lesser included offenses thereto as ascribed by the Petitioner and the courts in Mastro v. State, 448 So.2d 626 (Fla. 2nd DCA 1984) and Houser v. State, 456 So. 2d 1265 (Fla. 1st DCA 1984). The Respondent maintains that pursuant to this inherent and acknowledged recklessness involved in operating an automobile while intoxicated, Baker, supra at 20, the legislative and judicial response to the problem of drunk drivers certainly requires that vehicular homicide be a lesser included offense to D.W.I. manslaughter; and this response has been fulfilled by this Court's designation of vehicular homicide as such Category 1 lesser included offense. Further, since vehicular homicide is a designated Category 1 lesser included offense of D.W.I. manslaughter, the Petitioner was clearly on notice that vehicular homicide could be a lesser included offense to that which was charged, and he could be so convicted of that offense.

In conclusion, this Court has determined vehicular homicide to be a Category 1 lesser included offense of D.W.I. manslaughter, and both the trial court and Fourth District Court below accordingly accorded deference to that determination. Since this Court's reasons for such determination are not overtly evident in the schedule, or in case law, Respondent has attempted herein to justify that Category 1 designation, and maintains that vehicular homicide is properly a necessarily lesser included offense of D.W.I. manslaughter.

CONCLUSION

Based on the foregoing arguments and authorities cited, Respondent respectfully submits that no error was committed by the trial court, and respectfully requests that the decision of the Fourth District Court of Appeal be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's Answer Brief on the Merits has been mailed to DOUGLAS N. DUNCAN, ESQUIRE, Foley, Colton & Duncan, P.A., 406 North Dixie Highway, West Palm Beach, Florida 33401 this 10th day of June, 1985.

Of Counsel