IN THE SUPREME COURT OF FLORIDA

JOHN MARTIN HIGDON,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 66,753

ANSWER BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Respondent accepts the statement of the case and facts as set forth by the petitioner. Although there is no disagreement as to the facts, respondent will refer to specific passages from the jury trial throughout the body of the argument.

SUMMARY OF ARGUMENT

Under Florida Rule of Criminal Procedure 3.390(d) trial counsel below failed to give any reasons for his objection that vehicular homicide should not be presented to the jury as a lesser included offense. This general objection certainly did not argue the reasons set forth in the appellate brief. Therefore, the standard of review should be limited to determine only if the information was fundamentally defective to the extent that it did not notify petitioner that he was on trial for vehicular homicide.

Under Florida Rule of Criminal Procedure 3.140(o), petitioner has demonstrated no prejudice that he was unprepared to meet any evidence of vehicular homicide. Rather the record reveals that petitioner was prepared to rebut evidence pertaining to vehicular homicide and indeed, never objected to (or asked for a limiting instruction to) evidence which was admitted relevant to vehicular homicide.

Petitioner's argument is predicated upon section 775.021(4), Florida Statutes (1981). Reading that statute in pari materia with section 860.01(1), Florida Statutes (1981), vehicular homicide must be a lesser included of DWI manslaughter. Section 860.01(1) has no penalty but refers to the general manslaughter statute. In addition, the wording of section 860.01(1) also states that a defendant can be "deemed" guilty of manslaughter. Since vehicular homicide is a lesser included offense of the

general manslaughter statute, then petitioner is on notice that vehicular homicide can be a lesser included of DWI manslaughter. Under the latter reasoning, petitioner cannot complain that he is subject to a second prosecution for the same criminal transaction under rule 3.140(o).

Both DWI manslaughter and vehicular homicide have causal elements. The negligence of the DWI manslaughter statute attaches at the time the accident occurred. Thus the negligence for DWI manslaughter could be equated to the reckless operation of a vehicle and as such vehicular homicide could be considered a lesser included offense.

Petitioner should have been under notice merely by the fact that vehicular homicide is contained in the schedule of lesser included offenses under the DWI manslaughter statute pursuant to IN THE MATTER OF THE USE BY THE TRIAL COURTS OF THE STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES IN THE STANDARD JURY INSTRUCTION OF MISDEMEANOR CASES, 431 So.2d 594 (Fla. 1981).

Even if this court agrees with petitioner's contentions, the petitioner should not be discharged. Rather, this cause should be remanded back to the circuit court to give the State of Florida the opportunity to file an amended information charging vehicular homicide.

A

PETITIONER'S COUNSEL BELOW DID NOT SET FORTH THE SPECIFIC GROUNDS OR ARGUMENT PRESENTED BY PETITIONER HEREIN AND HIS FAILURE TO COMPLY WITH FLORIDA RULE OF CRIMINAL PROCEDURE 3.390 (d) PRECLUDES REVIEW EXCEPT FOR FUNDAMANTAL ERROR

ARGUMENT

During the charge conference the state attorney requested vehicular homicide as a lesser included offense (R 837-838). The trial court announced that vehicular homicide was a lesser included offense and that he would give the charge (R 838). Petitioner's counsel below (Mr. Ray) simply stated, "I would object to that. That's not my understanding". (R 838). Florida Rule of Criminal Procedure 3.390(d) states that a party must object to an instruction and must state distinctly the matter to which he objects and "the grounds of his objection". The objection by defense counsel is thus inadequate. Nowhere does defense counsel advocate the arguments presented by petitioner in the instant case.

On appeal, the contention is that the charging documents (pursuant to section 860.01, Florida Statutes 1981), fail to allege all the essential elements of vehicular homicide and thus failed to properly apprise petitioner that he was being tried for that offense. Essentially the contention is put forth as a "due process notice" argument. Petitioner concluded, "...it becomes crystal clear that vehicular homicide is not now, although clearly it could become with a change in the causal requirement a necessarily lesser included offense of DWI manslaughter." (See petitioner's initial

brief at page 17.) Defense counsel's cursory and general objection below certainly cannot be interpreted to encompass the latter arguments.

Petitioner's assertions challenge the schedule of lesser included offenses promulgated IN THE MATTER OF THE USE BY THE TRIAL OF THE STANDARD JURY INSTRUCTION IN CRIMINAL CASES AND THE STANDARD JURY INSTRUCTIONS IN MISDEMEANOR CASES, 431 So.2d 594 (Fla. 1981), to the extent that vehicular homicide is listed as a category one lesser included offense of DWI manslaughter. Yet much of petitioner's analysis is based upon case law and theory as to when a court may sentence an offender for multiple offenses based upon one criminal transaction. Thus much of petitioner's argument is implicitly predicated upon section 775.021(4), Florida Statutes (1981).[1] This statute states:

> Whoever, in the course of one criminal transaction or episode, commits an act or acts constituting a violation of two or more criminal statutes, upon conviction and adjudication of guilt shall be sentenced separately for each criminal offense, excluding lesser included offenses, committed during said criminal episode, and the sentencing judge may order the sentences to be served concurrently or consecutively.

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1 The trial was held in April of 1983. The amendment to section 775.021(4) was not effective until June 23, 1983. See, Ch. 83-156, § 2, Laws of Fla. Therefore, section 775.021(4) Florida Statutes (1983) would not have been operable at the time of conviction.

The latter statute is directed towards sentencing; not sufficiency of the information. Although the two areas may overlap somewhat, respondent submits that this issue should not be viewed exclusively from the perspective of statutory elements as analyzed pursuant to section 775.021(4). Respondent submits that this court must review this issue pursuant to Florida Rule of Criminal Procedure 3.140(o). Inasmuch as the dispute involves the sufficiency of the information (albeit pertaining to a lesser included offense), the latter rule cannot be ignored. Under this rule an information may only be dismissed where it is so vague, indistinct, and indefinite as to mislead the accused or embarrass him in the preparation of his defense or there is a danger of a new prosecution for the same offense. In Jones v. State, 415 So.2d 852 (Fla. 5th DCA 1982) the sufficiency of the information was examined from the perspective of the latter rule based upon a fundamental error examination. The reviewing court explained that there was a difference between an information that completely failed to charge a crime and one where the charging allegations are incomplete or imprecise. The court went on to explain that the former information is one that is vague, indistinct, and indefinite so as to mislead the defendant in the preparation of his defense or expose him to a substantial danger of a new prosecution for the same offense. Inasmuch as defense counsel below, pursuant to Jones, did not allege any prejudice or give any grounds regarding his objection to the lesser-included offense, respondent submits that an analysis of this issue must be on a fundamental basis, i.e., must be examined from the perspective of rule 3.140(o).

In McMurtroy v. State, 400 So.2d 547 (Fla. 3rd DCA 1981), it was held that an omission of an intent element from a robbery instruction did not constitute fundamental error in the absence of a real dispute on that question. In Courson v. State, 414 So.2d 207 (Fla. 3d DCA 1982), defendant was charged with attempted first-degree murder. After the verdict was rendered, the defendant in Courson argued for the first time that aggravated assault was not a lesser included offense of attempted first-degree murder because the murder information did not have an allegation of fear. But at the trial the defendant only objected to all of the lesser included offenses as opposed to specificially objecting to aggravated assault as a lesser included offense and thereby was precluded from making that argument on appeal. The respondent is aware that petitioner in the case at bar did object to the vehicular-homicide instruction (although that was the only lesser included offense given). Nevertheless, respondent submits that not only was the objection in the case at bar insufficient under Rule 3.390(d) but the excerpts from the trial reveal that petitioner suffered no prejudice and indeed could not have been embarrassed or surprised that vehicular homicide was a lesser-included offense.

During the state's case in chief a Mr. Bulleman testified that he saw petitioner's truck going by "real fast" and speeding to the extent that the vehicle was going too fast for the road conditions. He further testified that he heard the motor running at a very high rate (R 47, 48, 49). After the impact with the two victims, the witness also testified that he saw petitioner strike a power pole with his vehicle (R 60). Mr. Montgomery testified that he saw petitioner traveling about 50 MPH in a 35 MPH zone. He could also

tell from the sound of the tires that petitioner was speeding. He testified that it was dark at the time of the accident (R 189). (The victims were last seen alive about 8 P.M. (R 273)). Ronald Palmatier testified that on the day of the accident he saw petitioner speeding about four or five o'clock in the afternoon. Petitioner was driving "careless". (R 319). The way the petitioner was driving forced his wife and children to get out of the way (R 319-320). Thomas Hughes also testified he saw petitioner swerving back and forth on the road from one side to the other and going at a very fast speed (R. 334). He described petitioner's driving as "very reckless". (R 335). Respondent notes that defense counsel below never objected to this evidence. Had defense counsel subscribed to what is now argued on appeal, he could have at least asked for a limiting instruction that the evidence be considered only for DWI manslaughter and not for purposes of vehicular homicide.

Much of the defense at trial was devoted to establishing the fact that petitioner drove his vehicle erratically, not because of his intoxication (or recklessness) but because he had hit a telephone pole or power pole as he was trying to return to the scene of the accident (R 635-709). Petitioner himself testified that he was driving 30 to 35 MPH (R 722, 743). He also denied traveling at a high rate of speed because he had ladders on his truck (R 742). He told the jury he traveled down the road carefully and was watching where he was going (R 745). He did not see the bicycle on the other side of the road (R 745).

During his closing argument, petitioner's counsel explained that the road was not as wide as the state witnesses

would have the jurors believe; it was a narrow road (R 884-885, 888). He emphasized that the accident happened on the road (as opposed to off the road) (R 885). He told the jury that the area was dark and that the bicycle had no reflectors (R 888). He specifically told the jury that certain testimony demonstrated that petitioner was not speeding. (R 889). He attempted to minimize Mr. Palmatier's testimony to the extent that petitioner was driving erratically (R 894-895). Finally defense counsel argued that no one saw petitioner's truck weaving until after he had hit the telephone pole (R 899).

Petitioner argues:

> Lacking the constitutional notice that he was also being tried for being the proximate cause of the alleged victims' deaths by reckless operation of a his motor vehicle, the Petitioner was not in a position to properly defend and bring before the jury evidence relevant to that issue.

(See, petitioner's initial brief at pages 15-16.) Respondent submits the excerpts cited herein from the trial would belie that argument. Furthermore, it is incumbent upon the petitioner to demonstrate prejudice; it cannot be presumed. Respondent would note that depositions as well as petitioner's opening statement are not a part of the record. But even if these items could demonstrate prejudice, it is the burden of petitioner to make this showing. See, Howell v. State, 337 So.2d 823 (Fla. 1st DCA 1976), and Wright v. Wright, 431 So.2d 177 (Fla. 5th DCA 1983). In view of the latter, it cannot be said that the petitioner was mislead or embarrassed in the preparation of his defense when he was also charged with vehicular homicide. Furhtermore, respondent submits

that the above trial excerpts demonstrate that petitioner's objection at trial was not directed toward the arguments presented on appeal. Petitioner argues that the "essential" elements of proximate causation and recklessness are omitted from the DWI manslaughter informations. Although essential elements of a crime may be omitted from an information, the omission is not necessarily fatal when viewed from a fundamental perspective. In Jones, supra, the defendant argued that a burglary information was fundamentally defective because it did not allege that the defendant's entry into a structure was without the consent of the person alleged to be the owner or custodian. In Courson, supra, an information for attempted first-degree murder left out the essential element of fear for purposes of giving a lesser included offense instruction on aggravated assault. But both these cases affirmed the judgement and sentences based upon a fundamental review basis.

Other jurisdictions are in accord. In State v. Carrico, 570 P.2d 49 (Ariz. 1977), the defendant was charged with forceable rape but the jury returned a verdict of statutory rape as a lesser included offense. The Arizona Supreme Court held that statutory rape was not a lesser included offense of forceable rape but held that the defendant was not taken by surprise nor suffered any prejudice pursuant to an examination of the record. Therefore the judgement and sentence was affirmed. Respondent submits this same type of analysis can be applied to the case at bar. See, also State v. Rupp, 586 P.2d 1302, 1308-1309, 120 Ariz. 490 (1 C.A. 1978), where a claim similar to the

one in the case at bar was dismissed because the defendant had actual notice before the trial of the lesser included offense and State v. Williams, 297 NW2d 491 (S.D. 1980) where the defendant argued that an essential element of aggravated assault was not contained in the information (i.e., great bodily harm) and the court ruled that where the state proved all the essential elements, the jury was instructed properly, and the defendant had sufficient actual notice, the conviction would be affirmed.

B

BASED UPON THE WORDING OF SECTION 860.01 FLORIDA STATUTES (1983), PETITIONER IS NOT SUBJECT TO A SUBSTANTIAL PROBABILITY OF BEING EXPOSED TO ANOTHER PROSECUTION FOR THE SAME OFFENSE.

Respondent would again quote from section 775.021(4) Florida Statutes (1981) as follows, "whoever....commits an act or acts constituting a violation of two or more criminal statutes, upon conviction... , shall be sentenced separately for each criminal offense, excluding lesser included offenses, committed during said criminal episode..." (emphasis supplied). Respondent cites the latter statutory language to compare it with section 860.01, Florida Statutes (1981). Respondent would quote the pertinent language from the latter statute as follows, "...such person shall be deemed guilty of manslaughter and on conviction shall be punished as provided by existing law related to manslaughter." (emphasis supplied). The above quoted statute has no separate sentencing provisions. It is axiomatic that one cannot be sentenced for a crime where the applicable statute has no punishment. Therefore the only way an offender can be sentenced pursuant to section 860.01 is by referring to the general manslaughter statute under section 782.07, Florida Statutes (1981). It would be legally impossible under section 775.021(4) to separately sentence an offender for DWI manslaughter and for general manslaughter when the specific statutes (sections 860.01 and 782.07) provide for just one

sentence. Respondent submits the specific provision of section 860.01 would have to be interpreted the way respondent has submitted the issue,because section 775.021(4) is a general statute while the former statute contains a narrow exception to the general rule. Therefore, a defendant should be on notice that a DWI manslaughter information alludes to the general manslaughter statute which in turn encompasses vehicular homicide as a lesser included offense. Although vehicular homicide is a category two lesser included offense of the general manslaughter statute, inasmuch as the elements of driving a motor vehicle are alleged in the DWI manslaughter information, vehicular homicide would then have to be a category one (i.e., a necessarily lesser included) offense.

Furthermore section 860.01 contains the unique statutory language that, "such person shall be deemed guilty of manslaughter..." Section 860.01, by its language, gives statutory notice to a defendant that if he or she is convicted of DWI manslaughter he/she will be deemed guilty of manslaughter. The legislature has provided alternative means for proving manslaughter. Therefore it would be a legal impossibility for a trial court to impose a separate judgement and sentence for both DWI manslaughter and manslaughter based upon the unique statutory wording of section 860.01. Again, since vehicular homicide is a lesser included offense of the general manslaughter statute, by analogy it would also have to be a lesser included offense of DWI manslaughter.

Respondent would quote from Jones, supra, at 853 as follows, "If the information recites the appropriate statute alleged to be violated, and if the statute clearly includes the admitted words, it cannot be said that the imperfection of the information prejudiced the defendant in his defense". Respondent submits that the statutory language under the DWI manslaughter information should put him on notice that he could be adjudicated or "deemed" guilty of manslaughter and thus he is subject to being found guilty of a lesser included offense of manslaughter. See, United States v. John, 587 F.2d 683, 688 (5th Cir. 1979) where it was held that an indictment was not deficient so that a lesser included offense of that indictment was also legally unassailable. See, also, Courson, supra.

The state may indict a defendant for premeditated first-degree murder only and yet the state still has the option to proceed under alternative theories of either premeditation or felony murder. In such a case no due process rights are violated. See, Welty v. State, 402 So.2d 1159, 1164 (Fla. 1981), and Knight v. State, 338 So.2d 201, 204 (Fla. 1976). In the case at bar, petitioner is likewise, under similar notice, even though petitioner alleges that certain elements were not put forth in the information. Respondent submits in view of the latter analysis, that the second prong under rule 3.140(o) has been satisfied, i.e., petitioner cannot be subject to a second prosecution based upon this criminal tansaction.

C

SINCE BOTH SECTION 860.01, FLORIDA STATUTES (1981) AND 782.071, FLORIDA STATUTES (1981) HAVE A CAUSAL ELEMENT, VEHICULAR HOMICIDE CAN BE CONSIDERED A LESSER INCLUDED OFFENSE OF DWI MANSLAUGHTER.

Both the DWI manslaughter and vehicular homicide statutes have a causal language. Respondent is aware of the holding and language quoted by appellant in Baker v. State, 377 So.2d 17, (Fla. 1979), but would likewise quote other language from that decision as follows: "Furthermore, section 860.01(2), is not the classic strict liability statute criticized by the commentators... the act of operating a motor vehicle involves culpability. We are not here dealing with the type of statute which imposes strict criminal liability for mere negligence or an act malum prohibitum. (footnote omitted)." Id. at 20. Respondent submits that the casual language of the DWI manslaughter statute should be interpreted similarily to the causal language in the vehicular homicide statute.

Petitioner also argues that the reckless driving is likewise not an element of DWI manslaughter. Yet this court in Baker stated:

> ....the negligence occurred at the time the driver, drunk and 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.

Id. at 18. Respondent submits that recklessness can be inferred

from the negligence which occurrs when the driver operates a motor vehicle in an intoxicated state. Therefore, recklessness can be inferred from the DWI manslaughter information. Respondent submits that the holding in Baker, supra, should be reevaluated as suggested by the Fifth District Court of Appeal in the case at bar.

D.

THE FACT THAT VEHICULAR HOMICIDE WAS IN THE SCHEDULE OF LESSER INCLUDED OFFENSES AT THE TIME OF THE TRIAL IN THE CASE AT BAR, SHOULD HAVE GIVEN THE PETITIONER NOTICE THAT HE WAS INDEED BEING CHARGED WITH THAT OFFENSE.

The schedule of lesser included offenses promulgated by this court included vehicular homicide as a lesser included offense in DWI manslaughter at the time petitioner was tried. Based upon that schedule respondent submits that the petitioner was on notice he was being tried for the lesser included offense as well as the main charge. Respondent recognizes that this argument has been reject in Mastro v. State, 448 So.2d 626, (Fla. 2d DCA 1984) but urges the court to reconsider this issue. Even petitioner acknowledges, "In the instant case, it is difficult to fault the trial judge for relying upon the schedule of lesser included offenses contained in the standard Florida Jury Instructions". (See petitioner's initial brief at page 17.)

E.

CONCLUSION

Respondent notes that the petitioner relies upon Ray v. State, 403 So.2d 956 (Fla. 1981). Respondent submits

that the reliance upon this case does not control the issues herein because in Ray the information was found fundamentally defective. Furthermore, respondent submits that the record discloses waiver of the claim (even though petitioner made a general objection), as discussed supra. Petitioner in his conclusion, simply requests that, "the petitioner must be discharged as to said charges". (See petitioner's initial brief at page 18.) If petitioner is successful with the argument, he would be estopped to assert double jeopardy on a retrial regarding the offense of vehicular homicide. See, Barnes v. State, 375 So.2d 40 (Fla. 3d DCA 1979), and Haugland v. State, 374 So.2d 1026, 1032 (Fla. 3d DCA 1979). In addition, petitioner waived speedy trial (R 1070, 1077, 1079) and such a waiver could be applied to a second amended information based upon the same criminal episode. See, Conner v. State, 398 So.2d 983 (Fla. 1st DCA 1981). Likewise, the statute of limitations would not bar a retrial in this cause. See, Rubin v. State, 443 So.2d 322 (Fla. 1980). In any event, the latter two issues are affirmative defenses which should be raised if and when the judgement and sentence are reversed and if the state attorney elects to file an amended information.

Based upon the foregoing authorities and arguments, the decision of the Fifth District Court of Appeal in the case at bar must be affirmed. Alternatively, if this court does reverse the district court's decision, petitioner must not be discharged

but rather the State of Florida should be given the opportunity to file an amended information charging petitioner with vehicular homicide.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Answer Brief on the Merits has been furnished, by mail, to Craig Stephen Boda, counsel for John Martin Higdon, at 630 N. Wild Olive Avenue, Daytona Beach, Florida 32018, this 30th day of April 1985.

W. BRIAN BAYLY
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