IN THE SUPREME COURT
STATE OF FLORIDA

FRANK ARMENIA,

Petitioner,

v.

CASE NO. 68,039

STATE OF FLORIDA,

Respondent.
_____/

RESPONDENT'S BRIEF ON THE MERITS

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SUMMARY OF ARGUMENT

This court must consider, above all, in reviewing section 316.1931, Florida Statutes (1983) that the problems caused by the drunken driver have escalated rather than diminished since the time of the decision in Baker v. State, 377 So.2d 17 (Fla. 1979).

The voluntary act of driving a motor vehicle while intoxicated which produces the death of any human being caused by the operation of said motor vehicle while so intoxicated is malum in se and not excusable. The presence of strict liability offenses has the effect of keeping a large class of persons from engaging in such activity.

Section 316.1931 contains no fault words and the only "causation" referred to is general causation, not "proximate causation" and a clear reading of the statute, as well as its history, reveals a legislative intent to enact a strict liability statute.

Section 316.1931 is a rational response to the problem of drunken drivers operating motor vehicles on the highways of this state and embodies a legislative judgment that persons who intentionally drive while intoxicated occupy a position of control and are to be held accountable for the occurrence of certain consequences.

ARGUMENT

IT IS NOT NECESSARY TO PROVE THAT THERE WAS A CAUSAL RELATIONSHIP BETWEEN THE MANNER OF OPERATION OF PETITIONER'S MOTOR VEHICLE OR HIS INABILITY TO AVOID THE ACCIDENT BECAUSE OF HIS INTOXICATION AND THE DEATH OF THE VICTIM TO CONVICT FOR A VIOLATION OF SECTION 316.1931 FLORIDA STATUTES (1983).

A number of factors may be considered of importance in deciding whether a legislature has meant to impose strict liability. Although this court has already considered such factors in Baker v. State, 377 So.2d 17 (Fla. 1979), and determined that the DWI manslaughter statute imposes strict criminal liability with neither negligence nor causation being elements of the crime, the petitioner asks this court to reconsider its interpretation of the statute.

Interspersed among all of petitioner's legal assertions are policy arguments. It is apparently petitioner's overriding legal and moral position that it is unfair to impute moral culpability and legal fault to him, through the causal chain, simply because he was legally intoxicated, which does not make him morally responsible for the collision and Overstreet's death, and should not subject him to the criminal penalty for manslaughter. The state would respond by asking whether the carnage caused on American highways by drunken drivers is fair? The state suggests that the overriding concern of this court in reconsideration of this issue must be the seriousness of harm to the public which may be expected to follow from the forbidden conduct.

> The old admonition "If you drive, don't drink; if you drink, "don't drive" is followed religously by nondrinkers and non-

> drivers, but few others. Unfortunately, we largely have ignored the problem caused by drunken drivers and quietly accepted as inevitable the staggering human loss of life and limb and property damage. The carnage caused by drunken drivers is a national disgrace. More of our citizens are killed or maimed each year by drunken drivers than were lost on the battlefields of Vietnam or Korea.

Moylan, New Approach to an Old Problem, 69 ABA J. 45 (1983).

The problems and the carnage caused by the drunken driver have not simply gone away or diminished since the time of this court's decision in Baker in 1979 and this court cannot simply look askance at or ignore those policy considerations it found to be compelling and valid in Baker:

> Is section 860.01(2) a rational response to a real problem? We must respond that (i) the problem of drunken drivers operating motor vehicles on the highway of this state is pernicious and real, and (ii) the response embodied in section 860.01(2) can be justified on deterrence grounds. Both are supported by our recent decision in Ingram v. Pettit, 340 So.2d 922 (Fla. 1976), where, in the context of a civil action for punitive damages, the statistics regarding fatalities resulting from accidents where drinking was a contributing factor are recited, and the public policy of punishment of drunk drivers as a deterrent is recognized. (Emphasis added).
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> Given, then, that the operation of a motor vehicle while intoxicated is a reckless (and therefore culpable) act, is it rational for the legislature to impose criminal sanctions for any death which occurs without regard to the tort law concept of proximate causation between operation of the automobile and the death? If the legislature can reasonably conclude that such a measure operates as a deterrent to those who create a recognized and serious social problem, then certainly it is. Although, as noted, legal scholars

> have questioned the efficacy of the deterrent effect of strict liability statutes, an argument can be made that the presence of strict liability sanctions for a particular activity has the effect not only of inducing persons to engage in that activity with greater caution, but may also have the effect of keeping a relatively large class of persons from engaging in the conduct at all.

377 So.2d at 19-20.

This court has held that an automobile is a dangerous instrumentality. Southern Cotton Oil Co. v. Anderson, 80 Fla. 441, 86 So.629 (1920). "Its dangerous propensities are heightened when operated by a person who is, by definition, incapable of exercising vigilance and caution." Ingram v. Pettit, 340 So. 2d 922, 925 (Fla. 1976). "Somewhere between the point of utter sobriety and the point of saturation, or immobility, the imbiber reaches the condition that makes him, at the wheel of a dangerous instrumentality, a motorcar, a killer." Clowney v. State, 102 So.2d 619, 621 (Fla. 1958). One who drives a motor vehicle in an intoxicating condition commits an intentional act which creates known risks to the public. One who is intoxicated is incapable of exercising reasonable vigilance and caution. The voluntary act of driving a motor vehicle while intoxicated which produces the death of any human being caused by the operation of said motor vehicle by any person while so intoxicated is malum in se and not excusable. The courts and the legislature of this state have evolved the notion that drunk drivers menace the public safety and are to be discouraged by punishment. See, Ingram v. Pettit, 340 So.2d 922, n.9 (Fla. 1976). The legislature, pursuant to the enactment of section 316.1931, Florida Statutes (1983),

and its statutory predecessors, has denounced and made a crime the operating of a motor vehicle when intoxicated, where the death of a human being occurs. See, Calhoun v. Baden, 15 So.2d 444 (1943).

The act proscribed by section 316.1931, involves an illegality from the very nature of the transaction and constitutes manslaughter. Section 316.1931 evinces a clear legislative intent to discourage this reckless and blatant disregard for public safety. The legislature has decided long ago to punish the act itself in order to deter further occurrences. A strict liability offense is a more efficacious deterrent than an ordinary criminal statute because "a person engaged in a certain kind of activity would be more careful precisely because he knew that this kind of activity was governed by a strict liability statute" and because "the presence of strict liability offenses might have the added effect of keeping a relatively large class of persons from engaging in certain kinds of activity." Wasserstrom, Strict Liability in Criminal Law, 12 Stan. L. Rev. 731, 736 (1960).

The petitioner argues that there is a confusion of actual and moral causation in that by defining "caused by" as the equivalent of "resulted from", moral responsibility, the mens rea, has become confused with descriptive or temporal causality. Petitioner asks this court to consider that the words of the DWI manslaughter statute, ["If the death of any human being is caused by the operation of a motor vehicle by any person while so intoxicated, such person shall be deemed guilty of manslaughter"], section 316.1931(2)(c), Florida Statutes, mean that the intoxi-

cated person must cause the death by his operation of a motor vehicle, as had the legislature wanted to construct a strict liability statute it could have used the words "resulted from" instead of "is caused by", as "resulted from" does not have the direct implication of moral fault that "is caused by" has. Petitioner's argument, while philosophically interesting, has little to do with proper statutory construction.

It is rare, if ever, that the legislature states affirmatively in a statute that described conduct is a crime though done without fault. What it does is simply to omit from the wording of the statute any language indicating that fault is a necessary ingredient. W. LaFave & A. Scott, Jr., CRIMINAL LAW § 31 (1972). The statute in question, section 316.1931, Florida Statutes (1983), is totally devoid of fault-words in the body of the act, except for the initial act of driving an automobile while intoxicated. This is clearly not a case where the legislature really meant to require fault but failed to spell it out clearly. The title of the act "Driving automobile while intoxicated" fully embraces the entire statutory prohibition and the body of the act itself sets out varying penalties dependant upon the damage to property or person by reason of operation of motor vehicles.

An examination of the history of legislation to punish intoxicated drivers from the original act, Chapter 6882, Laws of Florida, Acts of 1915, through Chapter 9269, Laws of Florida, Acts of 1923, Chapter 11809, Laws of Florida, Acts of 1927 up to the present section 860.01(2) Florida Statutes (1977), renumbered in 1982 as section 316.1931, Florida Statutes upon which the

present prosecution is based, are substantially the same in their reference to the operation of motor vehicles. Thus, for almost three-quarters of a century, there has been law upon the statute books providing punishment of those who endanger the lives and property of others by operating automobiles while intoxicated, and such statutes have been interpreted as strict liability statutes.

As early as 1926, in Cannon v. State, 91 Fla. 214, 107 So.360, (1926), this court interpreted the precursor to the present statute, Chapter 9269 of the Laws of 1923, which contains substantially the same language as section 316.1931(2), and held:

> The felony lies not in the driving of an automobile negligently while intoxicated, or under the influence of intoxicants, but in the killing of a person "by the operation of a motor vehicle while intoxicated", and in such case the question of culpable negligence in the driving of the automobile is not made an element of the crime. No doubt the lawmakers based this statute upon the proposition that it is criminal negligence for a person in an intoxicated condition to attempt to drive an automobile upon the highways of this state, and that, if death results to any person while so doing, such initial negligence will be imputed to the act itself, and the driver held guilty of manslaughter (Emphasis supplied).

107 So. at 362.

The most apt description of the offense was later set forth in 1942 and this court construed the provision in accord with Cannon in Roddenberry v. State, 152 Fla. 197, 11 So.2d 582, 584-85 (1942):

> . . . There is no burden upon the state to

> prove that at the time of the incident 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.
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> . . . 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.

In Baker v. State, 377 So.2d 17-19 (Fla. 1979), this court adopted and reiterated the holding and language of Cannon and Roddenberry, and in accordance with decades of precedence held that neither negligence nor causation is an element of the crime embodied in the DWI manslaughter statute.

The DWI manslaughter statute has remained virtually the same since its creation in 1915 and has been consistently construed to impose strict criminal liability based on legislative intent and the clear wording of the statute. It is not likely that a statute has been misconstrued and misinterpreted for seventy-one years. It is even more unlikely that the legislature would not revisit such a misconstrued statute and add fault-words or make it clear that negligence and causation are elements of the crime. This court said as much in Baker:

> The legislature's reluctance to revisit the statute, in spite of ample opportunity leads to the conclusion that the judicial construction of section 860.01(2) accurately reflects legislative intent.

377 So.2d at 19.

In construing a legislative penal enactment, the intention of the lawmakers, gathered from the language and purpose of the act, is the guiding consideration, and every portion of such act should be given its proper effect. Atlantic Coast Line Railroad Co. v. State, 73 Fla. 609, 74 So.595 (1917). The pertinent portions of section 316.1931 are set out as follows:

> Driving automobile while intoxicated; punishment--(1) It is unlawful for any person, while in an intoxicated condition. . . to such extent as to deprive him of full possession of his normal faculties, to drive . . . any automobile . . . Any person convicted of a violation of this section shall be punished as provided in s. 316.193. . . (2) If, however, damage to the property or person of another . . . is done by such intoxicated person . . . by reason of the operation of the vehicles mentioned herein, he is guilty of a misdemeanor of the first degree . . . and if the death of any human being is caused by the operation of a motor vehicle by any person while so intoxicated, such person shall be deemed guilty of manslaughter and on conviction shall be punished as provided by existing law relating to manslaughter. (Emphasis added).

As previously stated, a review of the statute reveals no fault-words, save for the very act of driving while intoxicated. The "causation" referred to in the statute refers only to causation in general, in that the accident occurred by reason of the operation of motor vehicles and does not require proximate causation to fix blame--only the operation of a motor vehicle while intoxicated. The standard jury instruction is wholly reconcilable with the statute and speaks only in terms of general causation, not of proximate causation or fault, providing only that the state must establish that the death of the victim was caused by the operation of a motor vehicle by the defendant. Florida Standard Jury Instructions at 69. Neither the statute

nor the instruction require that the death be caused by the "grossly negligent", "negligent" or "reckless" operation of the vehicle by the defendant.

The meaning of the statute is precisely clear and this court has no legislative function but must seek only to ascertain the will of the legislature and the expediency of the statute is not to be determined by the court, but by the legislature in enacting it. Fine v. Morgan, 74 Fla. 417, 77 So.533 (1917); Butler v. Perry, 67 Fla. 405, 66 So.150 (1914). Petitioner asks this court to ignore the clear meaning of the statute as well as almost three-quarters of a century of legislative history.

Contrary to petitioner's further assertions, the carnage on the highways caused by drunken drivers and the desire to discourage driving while intoxicated with its concomitant destructive possiblities are sufficient in and of themselves to support a case for DWI manslaughter being a strict liability crime without consideration of the continuing validity of the felony murder doctrine in England or an examination of the crime statutory rape, and the course taken by other jurisdictions has no bearing on what the legislature in Florida intended by the statute, and such statute prevails over jury instructions. Driving while intoxicated is a national problem and the consequences of it are deadly and destructive. A stronger case for strict liability can be made today than ever before.

Petitioner rails against the constitutionality of the statute by citing an example set out in the dissent in Baker--the intoxicated driver without fault who is struck from behind and

convicted of DWI manslaughter. Yet, we are not here on appeal upon such a case, and for good reason. Often this type of statutory crime has been created in order to help the prosecution cope with a situation wherein intention, knowledge, recklessness or negligence is hard to prove, making convictions difficult to obtain, unless the fault element is omitted. The legislature may think it important to stamp out the harmful conduct at all costs and may expect a lot of prosecutions in a certain area of harmful activity and, therefore, wish to relieve the prosecuting officials of the time-consuming task of preparing evidence of fault, while expecting that the prosecuting officials, in the exercise of their broad discretion will use the statute only against those persons who were reckless and negligent. See, W. La Fave & A. Scott, Jr., CRIMINAL LAW § 31 (1972). This is not a case where the prosecution has used the statute against those unworthy of blame and the factual scenario envisioned by Justice Boyd in the Baker dissent is unlikely to ever wend its way before an appellate court in this state and it is not until such time that attacks should be made based on concepts of fairness.

Carl Ikonen followed the petitioner for three or four miles prior to the accident and observed his driving (R 156). Petitioner made a U-turn in front of Ikonen, requiring him to apply his brakes (R 145-146). In making the U-turn, petitioner drove onto the shoulder of the road (R 146). Ikonen also observed him weave in and out of the eastbound lanes (R 146). He tried to pass petitioner twice and both times petitioner accelerated (R 146-147). Although an accident reconstruction expert testified that it was his opinion that petitioner did not have time to

avoid the accident (R 246), the fact remains that the car in front of the petitioner was able to avoid the accident. As the driver in front of petitioner approached the westbound car waiting to make a left turn, it began to make a left turn in front of him, however, he applied his brakes, flashed his lights, and honked his horn at the vehicle and it came to a stop in the eastbound passing lane (R 17-18,25-27). It then continued its left turn colliding with petitioner's vehicle. It is hard to imagine that petitioner was not warned of the possibility of an accident by the braking, flashing of lights and by the horn of the car in front of him. It is hard to imagine that petitioner could not have slowed down when the car ahead of him had braked and the crossing car had come to a stop. It is most likely that petitioner was lulled into a sense of security by the stopping of the other vehicle, while an unintoxicated driver, exercising more vigilance than petitioner would have been alerted to the possibility that this vehicle would continue on its course. It is hard to attribute any sort of vigilance to the petitioner, when the unexpecting vehicle is able to avoid the accident, yet the forewarned vehicle simply drives into its destructive destiny.

Statutes which impose strict criminal liability, although not favored, are nonetheless constitutional, particularly when the conduct from which the liability flows involves culpability or constitutes malum in se as opposed to malum prohibitum. Baker v. State, 377 So.2d at 19. Section 316.1931 is a rational response to the pernicious and real problem of drunken drivers operating motor vehicles on the highways of this state and can be justified as a matter of public policy by the punishment of drunk

drivers as a deterrent. Contrary to petitioner's assertions, the statute does not select a few of those who engage in this reckless conduct and mete out to them a harsher punishment depending on circumstances in no way related to the offender's actual culpability. The statute punishes all who engage in this reckless conduct and become involved in automobile fatalities and such persons are put on notice of the consequences of their acts by the statute itself and have only to avoid that dangerous instrumentality, the automobile, when drinking to avoid the application of the statute. That is a small price to pay for continuing freedom and is based on a larger social good. Driving an automobile is a privilege and there simply is no right to drive while intoxicated, endangering large numbers of people. This is not conduct unaccompanied by an awareness of the factors making it criminal and the actor is one who needs to be subjected to punishment to deter him and others from behaving similarly in the future. Moreover, section 316.1931 does require fault, involving conduct malum in se, in the sense that it embodies a legislative judgment that persons who intentionally drive while intoxicated occupy a position of control and are to be held accountable for the occurrence of certain consequences.

CONCLUSION

Based on the arguments and authorities presented herein, respondent respectfully prays this honorable court approve the decision of the Fifth District Court of Appeal affirming the instant conviction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Respondent's Brief on the Merits has been furnished by mail to Michael L. O'Neill, Assistant Public Defender, 112 Orange Ave., Suite A, Daytona Beach, Florida, 32014, counsel for the petitioner this 27th day of January, 1986.

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