IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs. Case No. 71,624

ANTHONY BARRITT,

Respondent.

ON DISCRETIONARY REVIEW FROM THE
DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

PETITIONER'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner, the State of Florida, was the appellee below and the prosecuting authority in the trial court and will be referred to herein either as "petitioner" or as the "state".

Respondent, Anthony Barritt, was the appellant below and the defendant in the trial court and will be referred to herein either as the "respondent" or by his proper name.

Record reference will be by the symbol "R" followed by the appropriate page number in parenthesis.

STATEMENT OF THE CASE AND OF THE FACTS

The chronology of the case sub judice and the facts pertinent thereto were adequately recited by the court below in its opinion reported as Anthony Barritt v. State of Florida, Case No. BQ-44 (1st DCA, December 15, 1987), 12 FLW 2864. A copy of its opinion and certified question of great public interest is included as an appendix herein and made a part hereof by reference.

SUMMARY OF ARGUMENT

"Reckless driving", as described in §316.192, Fla. Stat., is, in a sense, a victimless crime. But when it is undisputed that a death has resulted from the mere operation of a motor vehicle "in a reckless manner likely to cause (the) death . . .", it is §782.071, Fla. Stat., that defines the crime. Vehicular homicide is a crime unto itself involving a different specie of bad driving other than "willful or wanton disregard . . . ." Where therer is no disputed factual issue for the jury to decide, i.e., whether the vehicular homicide statute or the reckless driving statute is applicable, a separate jury instruction on reckless driving would seem an absurdity and tantamount to a statement by the trial judge that the resulting death is an irrelevancy. Nothing could be more confusing to a jury or make less sense if logic is to prevail in criminal proceedings. The jury's "pardon power" is neither a sacred cow nor a constitutional right and should not be perverted to the extent that it ignores the proof. If the legislature had intended to require proof of willful or wanton disregard as opposed to operation of the vehicle in a reckless manner, it would have included these elements in the vehicular homicide statute. The respective burdens of proof are not the same. Therefore, reckless driving is a separate and distinct offense and only the degrees of homicide and the definitions of justifiable and unjustifiable homicides should be included in the jury

instructions at a homicide trial where the fact of and cause of the resulting death is not in dispute.

ARGUMENT

ISSUE

WHETHER "RECKLESS DRIVING" (§316.192, FLA. STAT.) IS A NECESSARILY LESSER INCLUDED OFFENSE OF VEHICULAR HOMICIDE SUCH THAT, WHERE A COURT REFUSES TO GIVE THE REQUESTED INSTRUCTION ON RECKLESS DRIVING DURING A TRIAL ON VEHICULAR HOMICIDE, IT COMMITS REVERSIBLE ERROR.

The First District Court of Appeal has certified to this court, as a question of great public importance, the following:

> Is reckless driving a necessarily lesser included offense of vehicular homicide such that, where a court refuses to give the requested instruction on reckless driving during a trial on vehicular homicide, it commits reversible error?

First, the state respectfully disagrees with the lower court in its conclusion that State v. Wimberly, 498 So.2d 929 (Fla. 1986), is controlling on the point sub judice. The principal issue in Wimberly is clearly distinguishable from the main issue presented here, i.e., Wimberly involved, in a manner of speaking, a "status crime". The battery victim in Wimberly was a "law enforcement officer" prior to his being battered by Wimberly, during the battery and thereafter. In other words, the victim's status as a law enforcement officer was never affected by any of the events under review. Given the status of the victim (as a law enforcement officer), it truly would have been impossible to commit the lesser included offense of battery

without also committing the greater charged offense of battery on a law enforcement officer. Therefore, the state finds no fault with this court's reasoning when applied to the circumstances of Wimberly. However, the case sub judice presents an important distinction which removes it from the purview of Wimberly.

Section 782.071, Fla. Stat., proscribes "the operation of a motor vehicle by another in a reckless manner likely to cause the death of, or great bodily harm to another." (Emphasis added.) Section 316.192, Fla. Stat., is entitled "Reckless driving" and appears to define such as driving "any vehicle in willful or wanton disregard for the safety of persons or property. . . ." For anyone to assume that the legislature intended for the courts to interpret operation of a motor vehicle in a reckless manner (likely to cause the death of or great bodily harm to another) as being synonymous with and one and the same as driving a vehicle in willful or wanton disregard for the safety of persons or property as in §316.192, requires pure conjecture. The vehicular homicide statute does not include as an element willful or wanton disregard for the safety of persons or property. Petitioner submits that anyone who operates a motor vehicle in a heedless manner likely to cause the death of or great bodily harm to another could be found guilty of the vehicular homicide statute if a human being is killed as a result of such

operation.[1] On the other hand, the term "willful and wanton" connotes a conscious disregard for the safety of others.[2]

Under the vehicular homicide statute, a person might well be operating a vehicle in a reckless manner likely to cause the death, etc., but at the same time, not necessarily willfully or wantonly. There are an endless variety of circumstances under which a person might operate a vehicle ;in a reckless manner but without a willful, wanton, conscious disregard for the safety of others. Consider the case of the elderly driver who knows he should not operate a motor vehicle but does so and, at the same time, exhibits no willful, wanton, conscious disregard for the safety of others. An immature driver might be guilty of the same thing but without being oblivious to the safety of others. Consider also a person under emotional stress who operates a vehicle in a heedless manner likely to cause injury, etc. How can it be said that any of these three drivers were fiery-eyed, willful and wanton as to their mental states? Therefore, petitioner must respectfully disagree wtih the court below as to its conclusion that "it is legally impossible to prove vehicular

[1] Black's Law Dictionary, 5th Ed. (1976), variously defines the term "reckless" as careless, heedless, inattentive, indifferent to consequences. According to the circumstances, it may mean desparately heedless, wanton or willful, or it may mean only careless, inattentive or negligent.

[2] See Black's Law Dictionary, 5th Ed. (1976).

homicide without proving reckless driving, the difference between the two crimes being the resulting death."

Petitioner notes that when instructing the jury relative to vehicular homicide, the court properly only dealt with operation of a motor vehicle "in a reckless manner likely to cause . . ." (R 177). Assuming, arguendo, that the court had defined "reckless manner" for the jury as "willful or wanton disregard for the safety of persons . . .". Petitioner concedes that because such terms as "willful or wanton disregard . . ." are more onerous than terms such as "reckless manner likely to . . ." the jury might well have found respondent not guilty of the vehicular homicide. But the state did not have to prove that respondent did anything involving "willful or wanton disregard for the safety . . . ." It only had to prove that he was operating his vehicular in a "reckless manner likely to cause . . .". Petitioner submits that the legislature might well have intended that if one drives badly, even willfully and wantonly, but does not kill anyone, then the crime is not serious enough to be classified as a felony. On the other hand, if someone drives badly but kills another person in so doing, it is not necessary that the state prove that the driver's frame of mind was either willful or wanton. It is enough that the defendant drove in a reckless manner but if in doing so, he kills someone with his vehicle, he is guilty of a felony - vehicular homicide. In other words, the legislature did not intend that the burden of proof be

the same in the two statutes with respect to the quality of the driving and/or the driver's state of mind. There is more difference between the vehicular homicide statute and the reckless driving statute than the mere fact of death. Therefore, petitioner would argue that it is legally possible to prove vehicular homicide without proving reckless driving. The difference between the two crimes is more than the mere fact of death.

This court's holding in Martin v. State, 342 So.2d 501 (Fla. 1977), is more apposite. Martin was charged by information with second degree murder. The charge arose from a shooting death. At the close of the evidence at trial, Martin's attorney requested an instruction on aggravated assault as a lesser included offense of second degree murder. The court refused to give this instructin and defense counsel duly objected. Martin was convicted of murder in the third degree. The district court affirmed and this court approved the district court's judgment. In cases involving homicide, proper jury instructions are limited to those charges involving lawful and unlawful homicide. Id., at 502. Paraphrasing Sadler v. State, 220 So.2d 797, 799-800 (Fla. 2nd DCA 1969), petitioner would argue that if the contention of the appellant below as to "lesser included offenses" is sound, then the trial court in the case at bar should have been required, upon request, to run down the gamut of the criminal lexicon to minor petty offenses including driving on the wrong

side of the road and failure to keep his vehicle under control. This was a death case, a vehicular homicide, and need not have involved any willful or wanton conduct. The defendant never argued at trial that there was any question about the victim's death being the proximate result of his bad driving. There is no dichotomy here - not facturally, not statutorily.

In Martin, supra, Justice Sundberg wrote:

> [T]he death of the victim is not an issue; it is an incontrovertible fact. The jury's duty is to ascertain whether the defendant caused the victim's death, and, if so, whether the homicide was justifiable or unjustifiable. If the jury finds that an unlawful homicide has occurred, they must then determine what degree of murder or manslaughter is involved. Whether an aggravated assault occurred as part of the crime that culminated in death of the victim is patently immaterial. (Emphasis added.)
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> * * *
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> In light of the above discussion, we hold that where a homicide has taken place, the proper jury instructions are restricted to all degrees of murder, manslaughter and justifiable and excusable homicide.

Id., at 502-503.

Because a death did, in fact, occur, jury instructions relative to non-death related offenses have no application and a separate instruction on reckless driving is no more appropriate than instructions on improper passing, improper crossing the center line or other minor offenses - even if all of the

foregoing were still cognizable as criminal offenses rather than traffic infractions. Notwithstanding the schedule of lesser-included offenses currently in use, which does not include reckless driving as a lesser included offense under vehicular homicide, a line is drawn where death occurs. A simple battery takes on an entirely different complexion with respect to jury instructions when a death occurs. Likewise, when a death occurs as a result of delivery of an illicit drug or when it occurs in connection with certain types of felonies such as a robbery, kidnapping, etc.. The Martin court recognized this important concept and its rationale precisely fits the case sub judice.

This court, in State v. Snowden, 476 So.2d 191 (Fla. 1985), noted the passage of the amendment to §775.0214, Fla. Stat. (1983), which incorporated the Blockburger[3] test:

> [T]his section now clearly expresses legislative intent that there be separate convictions and sentences for separate criminal offenses 'if each offense requires proof of an element that the other does not, without regard to the accusatory pleading or the proof adduced at trial'.

Id., at 191, footnote. See also Barton v. State, 507 So.2d 638 (Fla. 5th DCA 1987), Vause v. State, 476 So.2d 141 (Fla. 1985).

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

Petitioner submits that here, the crime of vehicular homicide has an element only driving "in reckless manner". The statute says nothing about "willful or wanton" conduct. Yet, for conviction of reckless driving that is precisely what must be proved beyond a reasonable doubt. Therefore, how can it be said that reckless driving is a necessarily included offense in vehicular homicide? Reckless driving requires proof of an element not included within vehicular homicide. If the defendant causes a death by operation of a motor vehicle in a reckless manner, the state need not prove any element of "willful or wanton" conduct. Although operation of a motor vehicle in a "reckless manner" could be driving bad enough to likely cause death or serious injury, it falls short of being ipso facto willful and wanton disregard for the safety of others. But it is vehicular homicide and a more serious offense than reckless driving because the driving, in a given case, in a careless manner causes a death. In the case sub judice, it may never be known whether the jury could have or would have found Barritt guilty of willful and wanton disregard for the safety of others as that is not how this jury was instructed nor should it have been, as a death resulted, and the state was not required to prove any willful or wanton conduct under the vehicular homicide statute.

Florida Rules of Criminal Procedure 3.490 prohibits the judge from instructing on any degree of the offense to which

there is no evidence. Likewise, Fla.R.Crim.P. 3.510(b) prohibits the judge from instructing on any lesser included offense as to which there is no evidence. In the case sub judice, arguendo, there may have been no evidence of willful and wanton conduct, yet all of the elements of the vehicular homicide statute were satisfied.

Regretably, the concept of the jury's "pardon power" has gotten out of hand and the injection of separate and distinct offenses into a jury trial, such as would be the case by injecting reckless driving as a jury issue under the facts given, ignores the proof. Justice Shaw wrote a very scholarly dissent in State v. Wimberly, supra. A small portion of it is quoted below:

> The majority uses the jury 'pardon power' as the basis for its holding that defendants have an absolute right to jury instructions on all necessary included offenses. My disagreement with the majority opinion is that it sacrifices the truth finding process on the altar of 'jury pardon' by injecting unnecessary confusion into a criminal proceeding.

State v. Wimberly, 498 So.2d, at 932.

Justice Shaw further queried that if a constitutional right to a jury pardon existed, Florida's standard instruction to the jury that it must find the defendant guilty of the highest charge for which proof exists, beyond a reasonable doubt, would

unconstitutionally deny the right to a jury pardon. Id., at 933, footnote 3.

In the case sub judice, the element of resulting death was not controverted. The United States Supreme Court in Sansone v. United States, 380 U.S. 343, 13 L.Ed.2d 882 (1965), held that instructions on necessarily included offenses are proper only when there is a disputed question of fact as to the unique element(s) of the greater offense. State v. Wimberly, supra, at 934.

In making his point, Justice Shaw quoted from Sansone as follows:

> [A] lesser-offense charge is not proper where, on the evidence presented, the factual issues to be resolved by the jury are the same as to both the lesser and greater offenses. Berra v. United States, supra; Sparf v. United States, 156 U.S. 51, 63-64, 15 S.Ct. 273, 277-278, 39 L.Ed. 343. . . . A lesser-included offense instruction is only proper where the charged greater offense requires the jury to find a disputed factual element which is not required for conviction of the lesser-included offense. Berra v. United States, [351 U.S. 131, 76 S.Ct. 685, 100 L.Ed. 1013], supra; Sparf v. United States, supra, 156 U.S. at 63-64, 15 S.Ct. at 277-278. . . .
>
> Sansone, 380 U.S. at 349-350, 85 S.Ct. at 1009.

Here, there is no disputed factual element. Debra Lanier's death was the proximate result of the manner in which respondent operated his truck and there was never any dispute on this point for the jury to resolve.

CONCLUSION

The certified question should be answered in the negative and the court below should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's Brief on the Merits has been furnished by U.S. Mail to **P. DOUGLAS BRINKMEYER, ESQUIRE**, Assistant Public Defender, Post Office Box 671, Tallahassee, Florida 32302, this 14th day of January, 1988.

ROYALL P. TERRY, JR.