IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 71,624

ANTHONY BARRITT,

Respondent.

_____/

BRIEF OF RESPONDENT ON THE MERITS

MICHAEL E. ALLEN
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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BRIEF OF RESPONDENT ON THE MERITS

PRELIMINARY STATEMENT, STATEMENT OF THE CASE, AND STATEMENT OF THE FACTS

Respondent files the brief in answer to the brief of petitioner. Respondent accepts petitioner's recitations at pages 1-2 of its brief on the merits. Attached hereto as an appendix is the decision of the lower tribunal.

SUMMARY OF THE ARGUMENT

Respondent will argue in this brief that the lower court was imminently correct when it awarded him a a new trial on the vehicular homicide charge. This is because he asked for an instruction on reckless driving as a lesser offense, which was refused. Vehicular homicide includes as one of its elements the requirement that the vehicle be driven in a reckless manner. Because the greater offense of vehicular homicide cannot be proven without also proving the lesser offense of reckless driving, the latter is a necessarily included lesser offense of the former. This is true even though there was no dispute at trial that the victim had died. This Court must approve the decision of the lower tribunal and allow respondent to proceed to his new trial.

ARGUMENT

THE LOWER TRIBUNAL WAS CORRECT IN HOLDING THAT RECKLESS DRIVING 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 vehicular homicide statute provides:

> "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 ... .

Section 782.071, Florida Statutes (emphasis added). The reckless driving statute provides:

> Any person who drives any vehicle in willful or wanton disregard for the safety of persons or property is guilty of reckless driving.

Section 316.192(1), Florida Statutes. Respondent's counsel requested that the jury be instructed on reckless driving as a lesser offense (R 26; 142-44). The prosecutor opposed the request because there was no dispute that the victim was dead. The court agreed with the prosecutor (R 144). The only options available to respondent's jury were guilty as charged or not guilty (R 27). The lower tribunal properly found reversible error.

The schedule of lesser offenses does not contain vehicular homicide. Thus, we must resort to case law to determine if reckless driving is a proper lesser offense of vehicular homicide.

In a pre-schedule case, Chitikus v. Shands, 373 So.2d 904 (Fla. 1979), the defendant entered a plea to reckless driving. He was later charged with vehicular homicide for the deaths which arose out of the same accident as the reckless driving charge. This Court held that he could not be prosecuted for the felony because he had already plead guilty to the misdemeanor: "We hold that reckless driving is a lesser included offense of vehicular homicide". Id. The judge below apparently agreed with the prosecutor and believed this decision had not survived the adoption of the schedule of lesser included offenses. This view is incorrect.

Analyzing the statutes at issue here, it is obvious that reckless driving has two elements: that the defendant drive a vehicle, and that he drive it recklessly. Vehicular homicide has the same two elements, plus a third that a person has died.

The recent case of Wimberly v. State, 476 So.2d 272 (Fla. 1st DCA 1985), approved, 498 So.2d 929 (Fla. 1986), is directly on point and the lower tribunal properly relied upon it for reversal. There the defendant was charged with battery on a correctional officer, whose elements are that the defendant commit a battery and that the victim be a correctional officer. There was no dispute that the defendant knew that his prison guard victim was a correctional officer. He requested an instruction on simple battery as a lesser offense. The state argued that this instruction was unnecessary because there was no dispute that the victim was a correctional officer. This

Court held that simple battery was a necessarily-included lesser offense and reversed for a new trial.

This Court traced the law of lesser offenses from its status prior to the adoption of the schedule in 1981 up to the amendments to Fla. R. Crim. P. 3.490 and Fla. R. Crim. P. 3.510, which were amended to conform to the schedule. This Court concluded that the schedule had not altered the view that a defendant is always entitled to an instruction on a necessarily-included lesser offense.

Here, reckless driving is always included in the greater offense of vehicular homicide because that crime cannot be proven unless the state also proves that the defendant drove in a reckless manner. The fact that there was no dispute about the death of the victim does not matter, just as the fact that Wimberly knew he was striking a correctional officer was of no importance. In light of Wimberly, the trial court below was incorrect in finding that the pre-schedule Chikitus case had not survived the adoption of the schedule. This Court must follow Wimberly and hold that respondent's jury was improperly denied the option of finding respondent guilty of reckless driving.

CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, respondent requests that the certified question be answered in the affirmative, and that the opinion of the lower tribunal, which remanded for a new trial, be approved.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand delivery to Robert A. Butterworth, Attorney General, The Capitol, Tallahassee, Florida, and a copy has been mailed to respondent, #556455, Dorm B-1, P.O. Box 340-Camp Road, Sharpes, Florida, 32959, this 3 day of ~~January,~~ February 1988.

P. Douglas Brinkmeyer

P. DOUGLAS BRINKMEYER