OA 8-29-88

IN THE SUPREME COURT OF FLORIDA

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STATE OF FLORIDA,	)	
	)	
Appellant,	)	
	)	
vs.	)	Case No. 72,383
	)	
CARLTON ROLLE,	)	
	)	
Appellee.	)	

ANSWER BRIEF OF APPELLEE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

OTHER AUTHORITIES

FLORIDA CONSTITUTION

FLORIDA RULES OF CRIMINAL PROCEDURE

STATEMENT OF THE CASE

Appellee Rolle accepts the state's statement of the case, except for its characterization of the decision of the Fourth District Court of Appeal as holding unconstitutional both Section 316.1934(2)(c), Florida Statutes (1985), and the jury instruction given at Appellee's trial on the presumption of impairment. In a separate Motion to Dismiss Appeal filed with this brief, Appellee Rolle contends that the District Court of Appeal did not declare the statute itself unconstitutional.

STATEMENT OF THE FACTS

Appellee Rolle disagrees with the following statement in the state's statement of the facts: that Appellee Rolle's speech was "incomprehensible" when he was stopped (page 3 of brief). Officer Cascio did not testify that Mr. Rolle's speech was incomprehensible., but rather that he did not understand him (R 55).

Appellee Rolle disagrees also with the state's characterization of Mr. Rolle's driving and performance on physical tests, and offers the following additional facts:

When Officer Cascio observed Mr. Rolle at the intersection, Mr. Rolle was not obstructing traffic (R 76). As Mr. Rolle pulled away from the intersection, he drove in a straight line (R 76). When the officer turned on his flashing lights, Mr. Rolle pulled over within a reasonable amount of time (R 77), approximately a block from the intersection (R 54). After the stop, as well as later at the police station, Mr. Rolle was polite and cooperative (R 77).

During the physical tests administered at the roadside, Mr. Rolle did not lose his balance during the balance test, although he swayed. On the finger-to-nose test, the officer's criticism was that Mr. Rolle bent his elbow in a manner the officer thought incorrect. On the heel-to-toe test, Mr. Rolle lost his balance after three steps the first time, but the second time he com-

pleted eight steps before being told to stop. Although Mr. Rolle recited the alphabet slowly, he completed it successfully (R 58-66).

Physical tests were administered a second time at the station by Officer Woodard. Mr. Rolle successfully walked a line, but after turning around he came back only five steps instead of the required six. He did the one-leg stand correctly, although he did not count by thousands as required. Mr. Rolle performed the finger-to-nose *test* correctly once he learned how, but to the best of Officer Woodard's recollection he might not have hit the center of the tip of his nose. The officer testified that Mr. Rolle was polite and cooperative, that his speech was fair, and that he was oriented as to time and place (R 160-166).

Appellee Rolle disagrees with the state's summarization of the opinion of the Fourth District Court of Appeal in this case. In a separate Motion to Dismiss Appeal filed with this brief, Appellee contends that the Fourth District Court of Appeal did not hold Section 316.1934(2)(c), Florida Statutes, (1985) to be unconstitutional.

The following facts are relevant to Points IV and V in this brief, which were not raised by the state, but which are offered by Appellee as alternative grounds for upholding the decision of the Fourth District Court of Appeal ordering a new trial. Points IV and V in this brief were raised in the District Court of Appeal in substantially the same form as Mr. Rolle's (there Appellant's) Points II and III.

The original information filed against Mr. Rolle alleged the three prior convictions necessary for the charge of felony DUI, but the amended information upon which he was tried eliminated this reference. The trial was bifurcated. The determination as to the prior convictions was left for a second phase conducted after the guilty verdict (R 322-323,330-331,336-337,339,306-318).

The first phase of the case was tried to a jury. After the jury returned its verdict, the defense requested a jury trial for phase two, on the issue of Mr. Rolle's prior convictions. The defense argued that the prior convictions were substantive elements of felony DUI, and suggested alternatively that the conviction could be left at that point as a misdemeanor. Both requests were denied (R 301-302).

At the sentencing hearing, the trial court, over defense objection, received certified copies of docket sheets and citations for prior DUI cases and a copy of Mr. Rolle's driving record (R 308-311). The citations, docket sheets and driving record were filed in the District Court of Appeal as a Supplemental Record and should be transmitted to this Court in that form.

Prior to trial, the defense had argued that these documents would be insufficient to prove Mr. Rolle's prior convictions and that the state would have to prove that Mr. Rolle was the one who had received the prior convictions. The defense had argued that witnesses would be required to identify Appellant through fingerprint or handwriting analysis and that the documentary

evidence would have to include the information, the plea of the accused, the jurisdiction of the court, the verdict of the jury, and the judgment and sentence of the court (R 12,15-16).

At sentencing, the defense again objected, and further contended that the information on the documents concerning date of birth and driver's license number which the court had earlier (R 16) and now again ruled sufficient, was hearsay (R 311). After the documents were received, the defense moved for judgment of acquittal on the felony on the grounds that Mr. Rolle had not been identified as the one who incurred the prior convictions. The motion was denied and the trial court found Mr. Rolle guilty of felony DUI (R 312-315).

SUMMARY OF ARGUMENT

I.

Although the Fourth District Court of Appeal did not directly hold Florida's statute establishing a presumption of impairment from a .10 blood alcohol level to be unconstitutional, and although this Court need not hold it to be so in order to affirm the District Court of Appeal, the statute is in fact unconstitutional because it states a mandatory rebuttable presumption. This is shown both by the wording of the jury instruction based upon the statute and by the wording of the statute itself. Alternatively, the wording of the statute does not establish a presumption at all and therefore does not authorize any jury instruction.

11.

The jury instruction which in the instant case transmitted the presumption of impairment to the jury was unconstitutional because it stated a mandatory rebuttable presumption. Any instruction which could be understood by a reasonable juror to state such a presumption is unconstitutional. Other general instructions on burden of proof and reasonable doubt cannot cure it. Nor can speculation on how the jury arrived at its verdict. This Court need not decide in this case whether a decision

affirming the District Court of Appeal should be prospective or retrospective, but it should promulgate a proper jury instruction if it does hold the statute itself to be constitutional.

111.

The unconstitutional presumption could be harmless only if this Court could say beyond a reasonable doubt that it did not contribute to the verdict. This would not be possible because Appellee did not cause an accident, he was not speeding or driving recklessly, and his performance on physical tests was substantially correct with only minor deficiencies.

IV.

This point and Point V were not addressed by the District Court of Appeal in its opinion but this Court has discretion to consider them if it rules against Appellee on Points I, 11, or 111. In this point, the proof that Appellee had three times previously been convicted of DUI was insufficient, *so* that the felony conviction for the fourth in the instant case was improper. Introduced at trial were the prior citations, docket sheets, and driving record. This was insufficient because (1) Appellee was never properly identified as the recipient of the priors, and (2) the documents themselves did not fulfill the requirements to show prior convictions; most notably absent was a judgment signed by the judge and recorded. Therefore, the instant conviction must be reduced to a misdemeanor.

V.

Appellee was improperly denied a jury trial on the issue of his prior convictions. The issue was properly withheld from the jury in phase one of the trial concerning impairment, but phase two concerning the priors should also have been decided by a jury rather than the judge. The priors are an essential element of the substantive charge of felony DUI and therefore must be decided by a jury.

ARGUMENT

POINT I

FLORIDA'S STATUTORY PRESUMPTION OF IMPAIRMENT FROM A .10 BLOOD ALCOHOL LEVEL IS UNCONSTITUTIONAL [RESTATED].

By a separate Motion to Dismiss Appeal filed in this Court, Appellee Rolle has contended that the District Court of Appeal did not declare Section 316.1934(2)(c), Florida Statutes (1985) to be unconstitutional. That which the court did declare unconstitutional was the jury instruction given at Mr. Rolle's trial, which stated that a blood alcohol level of .10 was "sufficient by itself to establish'' impairment. As pointed out in Appellee Rolle's motion, the jurisdictional prerequisite for this direct appeal from the decision of the District Court of Appeal is therefore not met. This Court should therefore leave the decision undisturbed. As established in Point II of this brief, the District Court of Appeal's ruling on the jury instruction was completely correct; it needs no further elaboration by this Court. Even if this Court does proceed to the merits, however, it need only uphold the District Court of Appeal's ruling on the jury instruction in order to affirm that court's decision. It is not necessary for this Court to reach the state's Point I in this appeal at all.

If this Court does decide to address the constitutionality of the statute itself, though, it will have to declare it unconstitutional because, like the instruction, it states an unconstitutional mandatory rebuttable presumption. Alternatively, this Court will have to interpret the statute as not author-

izing such a presumption, and limit its application appropriately, Under either of these two possible holdings, no jury instruction on a presumption could be permitted. These two options will be discussed separately in the subheadings below.

A.

Appellee Rolle agrees in principle with the state that the proper approach for analysis of statutory presumptions is by reference to the jury instructions which transmit the presumptions to the jury and thereby give them effect. However, the state's attempt to use this analytical approach as a means of insulating statutes enacting presumptions from judicial scrutiny is an exercise in sophistry. Under the state's approach, all manner of unconstitutional statutes could remain on the books as long as they were never applied as written. While this situation may exist with many enactments (one thinks of the humorous stories of outdated laws regulating hitching posts, bathtubs, etc.), it is certainly not the case with the statutory presumption involved in the instant case. Practicality and constitutional law require scrutiny of statutory presumptions through reference to the instructions which are based upon them.[1] If,

[1] Not all presumptions are statutory, and therefore there is not always a statute to focus on. This was the situation in the leading cases of Francis v. Franklin, 471 U.S. 307, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985); and Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979). On the other hand, Miller v. Norvell, 775 F.2d 1572 (11th Cir. 1985), involved, like the instant case, a Florida statutory presumption. The court scrutinized both the jury instructions and the statute on which they were based and concluded that both had to fall.

on the other hand, the instructions cannot be equated to the statute, then an entirely different defect would arise: application of a presumption with no legal foundation (see subsection B of this point on appeal).

Scrutinizing Section 316.1934(2)(c), Florida Statutes (1985), via the jury instructions which put it into effect in the instant case, it is apparent that the statutory presumption operates as an unconstitutional mandatory rebuttable one in violation of Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979); Francis v. Franklin, 471 U.S. 307, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985); and Miller v. Norvell, 775 F.2d 1572 (11th Cir. 1985). This argument is developed fully in Point II of this brief. At this point it is sufficient to note that the wording of the jury instruction that a blood alcohol level of .10 or more "would be sufficient by itself to establish" impairment, coupled with the instruction's further statement that "such evidence may be contradicted or rebutted by other evidence," directed the jury to employ the statutory presumption as mandatory and rebuttable. The constitutional defects are that the mandatory aspect of the presumption relieves the state of its affirmative burden of persuasion on the essential element of impairment, and that the rebuttability provision compounds the constitutional deficiency by putting the burden on the defense to produce the rebuttal evidence. Francis v. Franklin, supra, 471 U.S. at 315-318, 105 S.Ct. at 1972-1973, 85 L.Ed.2d at 354-356.

The mandatory language of the jury instruction is based upon equally mandatory language in the statute itself. Section 316.1934(2) plainly and repeatedly states that blood alcohol test results establish presumptions. The final clause of subsection (2) states that test results "shall give rise to the following presumptions." Immediately following are subparagraphs (a), (b), and (c), relating the presumptions to specific blood alcohol levels. Both Sandstrom v. Montana, supra, and Francis v. Franklin, supra, declared unconstitutional jury instructions using the words "presumes," "presumed," or "presumption." Numerous other cases from other states have overturned instructions on blood alcohol and intoxication using the words "presumption," "presumed," or "presumptive evidence."[2]

The term "prima facie" in subparagraph (c), the specific provision involved here, has also been held to transmit an unconstitutional mandatory presumption. In Miller v. Norvell, supra, the court held unconstitutional another Florida statutory presumption using the term "prima facie evidence," and struck down both the jury instruction and the statute using that term, One of the legal definitions of prima facie evidence in Florida is "evidence sufficient to establish a fact unless and until rebutted." State v. Kahler, 232 So.2d 166 (Fla. 1970); Merit

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2 Barnes v. People, 735 P.2d 869 (Colo. 1987) (en banc); Simon v. State, 182 Ga.App. 210, 355 S.E.2d 120 (1987); People v. Malik, 446 N.E.2d 931 (Ill.App. 1983); Commonwealth v. Gearhart, 384 A.2d 1321 (Penn.App. 1978); People v. Perez, 516 N.Y.Supp.2d 70 (1987); Boone v. State, 689 S.W.2d 467 (Tex.Cr.App. 1985) and Wilson v. State, 658 S.W.2d 615 (Tex.Cr.App. 1983); State v. Dacey, 418 A.2d 856 (Vt. 1980); City of Olympia v. Sprout, 492 P.2d 586 (Wash.App. 1971).

Clothing Co. v. Lees, 218 So.2d 779 (Fla. 2d DCA 1969). This is clearly the language of a mandatory rebuttable presumption. It is the definition which was given in the unconstitutional instructions in Miller v. Norvell,

The state seeks to have this Court uphold the statute by application of judicial rules of statutory construction. However, these rules, sometimes highly technical, have been developed by courts for their own use in dissecting statutes. The required constitutional analysis for presumptions, however, is quite different and a good deal simpler: it is the "reasonable juror" standard. Presumptions are to be judged on what a reasonable juror could understand the instructions on them to mean. Francis v. Franklin, supra, 471 U.S. at 315, 105 S.Ct. at 1971-1972, 85 L.Ed.2d at 354. As pointed out in footnote 3 in Point II of this brief, numerous decisions have found instructions on the presumption of impairment from blood alcohol level to be unconstitutional because of wording quite similar to that in the instant case. The words in the statute itself would be no better guidance to a reasonable juror than those in the instruction. As noted in the previous paragraph, "presumption," "presumed," "presumptive evidence," and "prima facie" have all been rejected also. The deficiency in all of these terms is that a reasonable juror could take them to be mandatory.

Dictionary definitions also show these terms to be mandatory. The specific words in the jury instruction are discussed in detail in Point II. As for the words in the statute, "presumed," according to Webster's Ninth New Collegiate Dictionary

(1984), means "to undertake without leave or clear justification," "to expect or assume," "to suppose to be true without proof," "to take for granted." Webster's defines "presumption" as, among other things, "a legal inference as to the existence or truth of a fact not certainly known that is drawn from the known or proved existence of some other fact." Finally, "prima facie" is defined as "true, valid, or sufficient at first impression...legally sufficient to establish a fact or a case unless disproved." None of these definitions would lead a reasonable juror to apply the statute in anything but a mandatory fashion. It would be unfounded speculation to expect any juror to know and apply constitutional principles *so* as to make the presumption acceptable.

The state's reliance on the statute's provision authorizing introduction of other evidence besides blood alcohol content is misplaced. This provision was transmitted to the jury in the instant case through the rebuttability clause in the jury instruction. As noted above and in Point 11, rebuttability merely compounds a mandatory presumption's unconstitutionality by shifting the burden to the defense. Even if this provision of the statute had been transmitted in the exact words of the statute itself, its effect still would have been the same. In the absence of an explicit instruction to the jury in conjunction with this provision, stating clearly that the defense had no obligation whatsoever to introduce such evidence, a reasonable juror could have understood the statute to shift the burden.

Because Florida's statutory presumption of impairment from blood alcohol level is unconstitutional, it should not be transmitted to the jury. Evidence of blood alcohol level is of course admissible as evidence. However, the jury should be left to give that evidence whatever weight it deems fit in light of any testimony explaining blood alcohol's effect on normal human faculties and in light of the standard jury instructions on evaluation of the evidence, burden of proof, and reasonable doubt.

B.

A second reason that the jury should not be instructed that impairment is presumed from a .10 blood alcohol level is that the statute itself does not authorize such instruction. The specific language of subparagraph (c) of Section 316.1934(2), Florida Statutes (1985), the subparagraph dealing with levels of .10 or greater, is that such a level "shall be prima facie evidence'' of impairment. This court has declared that the meaning of this phrase in a criminal evidentiary statute, such as that in the instant case, is proof deemed to be a sufficient showing to allow a case to go to the jury. State v. Waters, 436 So.2d 66, 70 (Fla. 1983). The establishment of such a prima facie case does not take away the defendant's presumption of innocence. Id., footnote 4. By its express words in Section 316.1934(2)(c), the legislature has merely authorized a DUI case to be sent to the

jury on evidence of a .10 or greater. The legislature has not, however, authorized the jury to presume the defendant guilty because of such a reading.

ARGUMENT

POINT II

THE DISTRICT COURT OF APPEAL CORRECTLY HELD UNCONSTITUTIONAL THE TRIAL COURT'S INSTRUCTIONS TO THE JURY THAT A BLOOD ALCOHOL LEVEL OF .10 "WOULD BE SUFFICIENT BY ITSELF TO ESTABLISH" THAT APPELLEE ROLLE WAS IMPAIRED AND THAT THIS EVIDENCE COULD BE REBUTTED BY OTHER EVIDENCE [RESTATED].

This point on appeal is the heart of this case, since it involves the presumption of impairment as it was actually transmitted to the jury through instruction by the court at Appellee Rolle's trial. It is, moreover, the only issue which this Court need decide in order to uphold the decision of the District Court of Appeal overturning Mr. Rolle's conviction. Although, as argued in Point I of this brief, the underlying statute establishing the presumption is unconstitutional, it is necessary to look no further than the actual instruction given to conclude that the jury here was directed to apply the presumption as an unconstitutional mandatory rebuttable one.

A.

The state has offered no argument whatsoever in support of the specific language in the jury instruction which the District Court of Appeal held to be unconstitutional. Indeed, there is nothing which could be said. The instruction plainly states a mandatory rebuttable presumption which is unconstitutional under the leading decisions in Francis v. Franklin, 471 U.S. 307, 105

S.Ct. 1965, 85 L.Ed.2d 344 (1985); Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979); and Miller v. Norvell, 775 F.2d 1572 (11th Cir. 1985).

The instruction given at Mr. Rolle's trial was worded as follows (R 273):

> If you find from the evidence that the Defendant had a blood alcohol level of .10 percent or more, that evidence would be sufficient by itself to establish that the Defendant was under the influence of alcohol to the extent that his normal faculties were impaired. However, such evidence may be contradicted or rebutted by other evidence.

The crucial words are "would be sufficient by itself to establish." Both as a matter of law as a matter of grammar this is mandatory language. The final rebuttability clause merely compounds the instruction's unconstitutionality by shifting the burden of proof.

The instruction amounted to a mandatory one because it relieved the state of its affirmative burden of persuasion on the crucial essential element of impairment. Francis v. Franklin, supra, 471 U.S. at 315-318, 105 S.Ct. at 1972-1973, 85 L.Ed.2d at 354-356. Such an instruction is a violation of due process because it violates the principle that the accused may only be convicted on proof beyond a reasonable doubt of every fact necessary to constitute the crime for which he is charged. Sandstrom v. Montana, supra, 442 U.S. at 520-524; 99 S.Ct. at 2457-2459; 61 L.Ed.2d at 48-51. The rebuttability clause compounds the constitutional deficiency by putting the burden on the defense to produce the rebuttal evidence. An instruction

that the presumption "may be rebutted" could reasonably be read as telling a jury that the defendant bore an affirmative burden of persuasion once the state proved the underlying fact giving rise to the presumption. Francis v. Franklin, supra, 471 U.S. at 318, 105 S.Ct. at 1973, 85 L.Ed.2d at 356.

The standard by which jury instructions on presumptions are to be judged is that of what a reasonable juror could have understood the charge to mean. Id., 471 U.S. at 315, 105 S.Ct. at 1971-1972, 85 L.Ed.2d at 354. Any instruction which could be interpreted to create a mandatory presumption, even a rebuttable one, is unconstitutional. Id.; Miller v. Norvell, supra, 775 F.2d at 1575. Numerous decisions from jurisdictions outside of Florida have found instructions on the presumption of impairment from blood alcohol level to be unconstitutional because of wording quite similar to that in the instant case.[3] The word

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[3] People v. Milham, 159 Cal.App.3d 487, 205 Cal.Rptr. 688 (1984) (overturning instruction that jury "should find" defendant under influence if blood alcohol .10 or higher); Barnes v. People, 735 P.2d 869 (Colo. 1987) (en banc) (instruction that "you must accept the presumption" of impairment "as if it had been factually established by evidence"); Peters v. State, 333 S.E.2d 463 (Ga. 1985) (instruction on presumption subject to valid challenge under Francis v. Franklin, supra and Sandstrom v. Montana; supra) and Simon v. State, 182 Ga.App. 210, 355 S.E.2d 120 (1987) (instruction that if reading .10 or more "it shall be presumed that the person was under the influence" shifted burden impermissibly); People v. Malik, 446 N.E.2d 931 (Ill.App. 1983) (instruction that jury "shall presume" that defendant was under the influence); State v. Hansen, 203 N.W.2d 216 (Iowa 1972) and State v. Hutton, 207 N.W.2d 581 (Iowa 1973) (holding erroneous portion of instruction stating that presumption is rebuttable and may be overcome or rebutted by evidence to the contrary); Commonwealth v. Moreira, 434 N.E.2d 196 (Mass. 1982) (reading may be disregarded "if you find that the presumptions raised by the statute have been overcome by other competent evidence"); Commonwealth v. Gearhart, 384 A.2d 1321 (Penn.App. 1978) (if

"sufficient" has also been crucial in instructions on other mandatory presumptions held unconstitutional. See, United States v. Romano, 382 U.S. 136, 86 S.Ct. 279, 15 L.Ed.2d 210 (1965); and Jolly v. People, 742 P.2d 891 (Colo. 1987).

As analyzed by the District Court of Appeal (page 4 of slip opinion), the wording here, "that evidence would be sufficient by itself to establish" impairment, means that a reading of .10 or more is ipso facto enough to find the defendant impaired, and thus guilty, unless the defendant comes forward with evidence and rebuts the presumption. As also stated by the court, a reasonable juror could conclude from such a directive that, if the reading is .10, no further proof by the state or determination by the jury need be made. Again, what a reasonable juror could understand is the critical inquiry. Francis v. Franklin, supra, 471 U.S. at 315, 105 S.Ct. at 1971-1972, 85 L.Ed.2d at 34.

As a matter of grammar as well, the words used in the instruction were mandatory. The word "would," according to Black's Law Dictionary, Fifth Edition (1979), is interchangeable with "should" but not with "could." According to Webster's Ninth New Collegiate Dictionary (1984), "should" is the past tense of

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breathalyzer proved beyond a reasonable doubt, "you will find him guilty"; "it shall be presumed" that the defendant was under the influence"); Boone v. State, 689 S.W.2d 467 (Tex.Cr.App. 1985) and Wilson v. State, 658 S.W.2d 615 (Tex.Cr.App. 1983) ("it shall be presumed"; "presumption may be overcome by evidence"); State v. Dacey, 418 A.2d 856 (Vt. 1980) (presumption "means that the defendant was under the influence of intoxicating liquor"); City of Olympia v. Sprout, 492 P.2d 586 (Wash.App. 1971) ("shall be presumed"). Improper burden shifting by a "rebuttal" instruction was also at issue in most of these cases.

"shall." Also according to Webster's, "shall" means "will have to" or "must"; shall is "used to express a command or exhortation," and is "used in laws, regulations, or directives to express what is mandatory.''

The word "sufficient" is also critical in the instruction. According to Black's, sufficient means "adequate, enough, as much as may be necessary," Webster's defines it as "enough to meet the needs of a situation or a proposed end," or "being a sufficient condition."

Finally, the use of the word "would" does not blunt the mandatory force of the instruction. There is no effective distinction between "would be sufficient'' and "is sufficient." "Would be" is merely the future conditional form of the verb "to be," while "is" is the present tense of the same verb. The instruction begins with the word "if" and therefore grammatically "would be" is required in the sentence rather than "is." However, once the jury made the preliminary finding of blood alcohol level, then substitution of "is" would be appropriate, since the sentence would no longer be conditional. This is exactly the effect of the instruction: evidence of blood alcohol level is sufficient by itself to establish impairment.

Even if this Court has any doubt that the plain meaning of the instruction was mandatory, the very existence of such a doubt shows that the instruction could have been interpreted to create a mandatory presumption. Any instruction which could be so interpreted is unconstitutional. Miller v. Norvell, supra, 775 F.2d at 1575; Francis v. Franklin, supra, 471 U.S. at 315, 105

S.Ct. at 1971-1972, 85 L.Ed.2d at 34. Even the state has conceded in its brief (page 29) that it is "arguable" that the instruction here would have conveyed a mandatory inference violative of Francis, and calls this a "defect".

B.

The state devotes the bulk of its argument on jury instructions to discussion of instructions other than the one on the presumption. The lengths to which the state has gone are futile. Francis v. Franklin makes it clear that other instructions, such as those relied upon by the state here, cannot cure an instruction stating a mandatory rebuttable presumption.

General instructions, such as those in the instant case, on the state's burden of proof and the defendant's presumption of innocence are not "rhetorically inconsistent" with a conclusive or burden-shifting presumption; the jury could still have interpreted the two sets of instructions as indicating that the presumption was a means by which proof beyond a reasonable doubt could be satisfied. Francis, 471 U.S. at 319, 105 S.Ct. at 1974, 85 L.Ed.2d at 356. Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity; a reviewing court has no way of knowing which of the two irreconcilable instructions the jurors applied. Id., 471 U.S. at 322, 105 S.Ct. at 1975, 85 L.Ed.2d at 358 .

The order in which the various instructions are given has no effect on this principle, contrary to what the state asserts as a "distinction" (page 27 of brief) between the instant case and

Francis. Indeed, some of the other instructions discussed in Francis, like those relied on here by the state, actually came after the challenged one. 471 U.S. at 318-320, 105 S.Ct. at 1974, 85 L.Ed.2d at 356-357. Moreover, the quotation offered by the state from footnote 7 of Francis (page 27 of brief) was in response to the dissent's reliance upon later instructions, a reliance rejected by the majority. In any event, whatever the order of the instructions, a reviewing court still has no way of knowing which ones the jurors applied. Francis, 471 U.S. at 322, 105 S.Ct. at 1975, 85 L.Ed.2d at 358.

The further instructions discussed by the state concerning the basic fact of blood alcohol level at the time of the offense do not bear upon the presumption itself. First, the instruction quoted by the state applied to the "relation back" of the reading at the time of the test to the blood alcohol level at the time of driving. This is an issue separate from the meaning and effect of the blood alcohol level itself, at no matter what time; the latter is the province of the presumption. Second, the facts basic to any presumption must of course be established before the presumption can be applied. No matter how firmly they are established, however, they still cannot justify application of a mandatory rebuttable presumption.

The fact that the jury viewed the video tape of Mr. Rolle a second time during deliberations does not, as contended by the state, show that the jurors "could not possibly" have interpreted the presumption instruction as mandatory (page 28 of brief). First, any emphasis afforded to the tape, or to any other piece

of evidence for that matter, would not have counteracted the improper jury instruction; on the contrary, it is the other way around - it is the jury instructions which give meaning to the evidence. Second, the only instruction given in conjunction with the second viewing of the tape was the standard deadlock charge, asking the jurors to continue their deliberations. This instruction offered no guidance on the law or on the proper consideration of the evidence, and therefore did nothing to counteract the original defective instruction on the presumption.

Finally, and most importantly, no matter what questions the jury might ask, it is still impossible to know, absent some sort of direct inquiry, how the jurors arrived at their verdict and what weight they gave to the various instructions and pieces of evidence. As long as the verdict could have been based, even partially, on a mandatory rebuttable presumption, it cannot stand. When a case is submitted to the jury on alternative theories, the unconstitutionality of any one of the theories requires that the conviction be set aside. Sandstrom v. Montana, supra, 442 U.S. at 526, 99 S.Ct. at 2460, 61 L.Ed.2d at 52.

C.

The state also dwells at great length in this point upon the issue of prospective or retrospective application of a decision invalidating the jury instruction in question. Although the state's concerns may be valid, the issue is not before this Court in this case. The benefit of a decision invalidating the instruction must obviously be extended to Mr. Rolle, especially

in view of the fact that at his trial he raised the exact constitutional objections which were the foundation for his appeal in the District Court of Appeal (R 233-234,285-286). The question of how the decision will apply to other cases will have to await cases coming before the courts in appropriate postures. In any event, it is worth noting that the United States Supreme Court recently decided in favor of retrospective application of Francis v. Franklin in Yates v. Aiken, U.S. , 108 S.Ct. 534 (1988).

D.

The state suggests that this Court should correct the defective jury instruction in the instant case by adopting a constitutionally correct one. In the event that this Court does decide that the statute authorizes a jury instruction on a presumption (see Point I in this brief arguing otherwise), then Appellee Rolle agrees that this Court should promulgate a correct instruction. The instruction proposed by the state appears to meet constitutional standards. ~~See also~~, the guidelines for DUI instructions set forth in Commonwealth v. Crum, 523 A.2d 799 (Penn.App. 1987) and Commonwealth v. DiFrancesco, 329 A.2d 204 (Penn. 1974).

ARGUMENT

POINT III

THE ERROR IN INSTRUCTING THE JURY ON A MANDATORY PRESUMPTION OF IMPAIRMENT FROM BLOOD ALCOHOL LEVEL WAS NOT HARMLESS ERROR UNDER CONSTITUTIONAL STANDARDS [RESTATED].

The Fourth District Court of Appeal in its decision on this case correctly applied the constitutional harmless error standard to the evidence and concluded that it could not hold harmless the mandatory jury instruction because it could not say beyond a reasonable doubt that the jury would have convicted Mr. Rolle absent the defective instruction. Improper application of a mandatory rebuttable presumption is error of constitutional dimension. (See Point II in this brief.) Therefore, only the constitutional harmless error standard may be applied. As correctly applied by the District Court of Appeal, this standard is that a constitutional error cannot be held harmless unless the reviewing court can say beyond a reasonable doubt that it did not contribute to the verdict. Miller v. Norvell, 775 F.2d 1572, 1576 (11th Cir. 1985); Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

The state's contention that there was overwhelming evidence of Mr. Rolle's impairment, besides the breath test reading which was the basis for the instruction on the presumption of impairment, is not borne out by the record. Most significantly, in this case there was no accident, no injury, no speeding, and no

reckless driving. Instead, the state relies upon Mr. Rolle's traffic infractions (for which he was apparently not charged) and his performance on physical tests at the roadside.

Regarding the driving infractions, it is true that Mr. Rolle was observed by police stopped at an intersection facing the wrong way on a divided highway. He was also observed to make a left turn through a red light. However, the police also testified that Mr. Rolle was not obstructing traffic at the intersection, and that he drove in a straight line as he pulled away (R 53-54,76). Mr. Rolle's errors in driving are just that and not necessarily evidence of impairment. Pulling out the wrong way onto one side of a divided four lane road, which because of the median could appear to be a two lane road, is an understandable error. Turning off of the road at the next intersection when no traffic was coming, despite the red light, could in fact be the safest way to correct the initial error.

Regarding the roadside physical tests, the criticisms of the administering officer, Officer Cascio, were minor. Although Mr. Rolle swayed during the balance test, he did not lose his balance. On the finger-to-nose test, Cascio's criticism was that Mr. Rolle bent his elbow in a manner which Cascio thought incorrect. On the heel-to-toe test, requiring six steps forward and six steps back, Mr. Rolle lost his balance after three steps the first time, but the second time he completed eight before being told to stop. Finally, although Mr. Rolle was slow in

reciting the alphabet, he did it successfully (R 58-66). Cascio also testified that Mr. Rolle was polite and cooperative when stopped (R 77).

Physical tests were also administered a second time at the police station, although they are not discussed by the state. Again, Mr. Rolle completed the tests substantially correctly with minor errors. Officer Woodard testified that Mr. Rolle successfully walked a line, but that after turning around he came back only five steps instead of the required six. He did the one leg stand correctly, although he did not count by thousands as required. Mr. Rolle performed the finger-to-nose test correctly once he learned how, although to the best of Woodard's recollection he might not have hit the center of the tip of his nose. The officer testified that Mr. Rolle was polite and cooperative, that his speech was fair, and that he was oriented as to time and place (R 160-166).

The District Court of Appeal was correct in concluding that it could not be said beyond a reasonable doubt that this other evidence alone would have led the jury to convict Mr. Rolle. Obviously, the crucial evidence in the case was the breath test. Instructing the jury that, in effect, it was obligated to convict because of the test results could not have been harmless error beyond a reasonable doubt.[4]

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[4] The cases cited by the state are all distinguishable. Two deal with sufficient evidence of corpus delicti for admission of the defendant's statements. State v. Edwards, 463 So.2d 551 (Fla. 5th DCA 1985); County of Dade v. Pedigo, 181 So.2d 720 (Fla. 3d DCA 1966). Of course this is not the same as evidence sufficient for a finding of harmless error beyond a reasonable doubt. State v. Benyei, 508 So.2d 1258 (Fla. 5th

DCA 1987) concerned the essential element of physical control of an automobile rather than the element of intoxication. In both State v. Macias, 481 So.2d 979 (Fla. 4th DCA 1986) and People v. Hickox, 751 P.2d 645 (Col.App. 1987), the evidence of guilt held to be overwhelming was much stronger than that in the instant case. In Macias, the defendant was observed by police for six blocks driving in an erratic manner, swaying from side to side, and at times crossing the center line. In Hickox, the defendant lost control of his pickup truck and caused two accidents and serious injuries to two other persons. There was also direct testimony that the defendant before the accidents had shared a pitcher of beer and had also drunk several other beers while driving.

ARGUMENT

POINT IV

THE TRIAL COURT ERRED IN FINDING APPELLEE ROLLE GUILTY OF FELONY DUI IN THE ABSENCE OF PROOF OF THREE PRIOR DUI CONVICTIONS.

This point has not been addressed by the state in its brief. However, it was raised by Appellee Rolle in the District Court of Appeal as his Point 11. Once this Court has jurisdiction, it may, at its discretion, consider any issue affecting the case. Cantor v. Davis, 489 So.2d 18, 20 (Fla. 1986). In the event that this Court rules against Appellee Rolle on the consitutional issues presented in Points I, 11, and III of this appeal, then this Court should go on to consider this point and Point V, since they both provide alternative bases for this Court to uphold, at least partially, the Fourth District Court of Appeal's decision ordering a new trial for Mr. Rolle.

This point involves the predicate of three prior DUI convictions necessary for a felony DUI conviction. Mr. Rolle in this case was tried and found guilty of felony DUI, a crime which depends on proof of three prior DUI convictions (R 330,339,354). Section 316.193(2)(b), Florida Statutes (Supp. 1986). There was insufficient evidence of prior convictions because, although copies of citations, docket sheets, and a driving record bearing Mr. Rolle's name were introduced (R 308-311), there was no evidence whatsoever of Mr. Rolle's identity as the previously-convicted individual. Moreover, even if there had been sufficient evidence of identity, the documents themselves still would

have been insufficient to prove the priors. The defense objected to the documents both before trial and at sentencing, and also moved for judgment of acquittal on the felony on the ground of insufficient evidence of identification regarding the priors (R 6-16,308-314). The overruling of the objections and the denial of the motion led to an improper felony conviction.

On a charge of a second or subsequent offense, the prior conviction is an essential element of the offense charged. Sparkman v. State Prison Custodian, 18 So.2d 772 (Fla. 1944). It is the responsibility of the prosecution in a second offender proceeding to prove the prior conviction by competent evidence; the existence of the prior conviction is a fact to be proved as any other fact. Shargaa v. State, 102 So.2d 809 (Fla. 1958).

The state must not only introduce records of prior convictions, but must also prove the identity of the defendant as the person previously convicted. To do this, the state cannot rely alone on similarity or identity of names of the defendant and the person previously convicted. Thompson v. State, 66 Fla. 206, 63 So. 423 (1913); Clinton v. State, 196 So. 684 (Fla. 1940); Fulford v. State, 113 So.2d 572 (Fla. 2d DCA 1959). Here, identity of names and some other peripheral information including date of birth and driver's license number was all that connected Mr. Rolle to the documents introduced by the state. In fact, the court specifically and incorrectly ruled that name, date of birth, and driver's license number were sufficient for admission (R 16, 311).

No witness appeared at Mr. Rolle's trial to identify him as the recipient of the prior convictions, nor did the state attempt identification through fingerprint or handwriting comparison, as suggested by the defense (R 16). Case law makes it quite clear the type of identification evidence which is acceptable in conjunction with proper documentation: testimony by the police officer who arrested the defendant for the prior offense, Dowling v. State, 210 So.2d 280 (Fla. 2d DCA 1968); testimony by the judge who presided at the prior trial, Warren v. State, 74 So.2d 688 (Fla. 1954); testimony by the prosecutor at the prior trial, Sharqaa v. State, supra; testimony by prison superintendent, Fulford v. State, supra, citing Parrish v. State, 90 Fla. 25, 105 So. 131 (1925); or testimony by fingerprint expert, Manning v. State, 456 So.2d 1303 (Fla. 1st DCA 1984). No such testimony was introduced in the instant case. The omission of such connecting evidence compels a reversal. Thompson v. State, supra.

Even if there had been sufficient connecting evidence of identification, however, the documents themselves still would have been insufficient. Proof of a prior conviction which is an element of an offense must be technical and specific. State v. Dixon, 193 So.2d 62 (Fla. 2d DCA 1966). The essential elements to proving a prior conviction by proper record are: the information, the plea of the accused, the jurisdiction of the court, the verdict of the jury, and the judgment and sentence of the court. Dowling v. State, supra; Ferguson v. State, supra; Warren v. State, supra.

Here, only traffic citations (equivalent to informations, it is conceded) and docket sheets were introduced. None of the other required documents besides the citations were produced: plea, verdict, and most importantly judgment and sentence. Only a written judgment, rendered in open court, signed by the judge, and recorded, would have been sufficient. Rule 3.670, Florida Rules of Criminal Procedure. The driving record cannot be accepted because it is not even a court record, but merely a hearsay compilation. (The citations, docket sheets, and driving record are all included in the Supplemental Record).

Even if this Court overturns the District Court of Appeal's decision ordering a new trial on the guilt phase, based upon the argument in this point on appeal this Court must at least uphold the District Court of Appeal to the extent of ordering reduction of the conviction to misdemeanor DUI, since Mr. Rolle was found guilty of the felony in the absence of sufficient evidence of the required prior convictions. The conviction on insufficient evidence for the felony violated Mr. Rolle's rights to due process and a fair trial under Article I, Sections 9 and 16, Florida Constitution, and the Fifth and Fourteenth Amendments, United States Constitution.

ARGUMENT

POINT V

THE TRIAL COURT ERRED IN DENYING A JURY TRIAL ON THE ISSUE OF WHETHER APPELLEE ROLLE WAS GUILTY OF FELONY DUI BY VIRTUE OF PRIOR CONVICTIONS.

Like Point IV, this issue is being raised by Appellee Rolle as an alternative ground for this Court to uphold at least partially the Fourth District Court of Appeal's decision ordering a new trial, in the event that this Court should overturn that court's decision on the presumption of impairment. This point was raised by Mr. Rolle as his Point III in the District Court of Appeal. This Court has discretion to consider this issue as well as the issues raised by the state. Cantor v. Davis, 489 So.2d 18, 20 (Fla. 1986).

This point, like Point IV, involves the phase two proceeding by which Mr. Rolle was found guilty of felony DUI by virtue of three prior DUI convictions. Under Section 316.193(2)(b), Florida Statutes (Supp. 1986), the prior DUI convictions are an essential element of felony DUI. As required by law, in order to prevent the jury from being prejudiced against Mr. Rolle because of the alleged prior convictions when it deliberated, the trial was separated into two phases. In the first phase, the question of guilt or innocence on the present charge of DUI was submitted to the jury. The question of whether the crime was a felony by virtue of prior convictions was reserved for the second phase (R 4-6, 20). Such a separation is mandated by the decision of this Court in State v. Harris, 356 So.2d 315 (Fla. 1978), dealing with

the procedure required for the similar crime of felony petty theft. However, the procedure in the instant case was still erroneous because the trial court refused to have the issue in phase two decided by a jury (R 301-302).

Initially, it is crucial to note that the issues to be tried in phase two under Harris are not mere sentencing issues, although the trial court here treated them as such and dealt with them at the sentencing hearing (R 308-318). Section 316.193(2)(b), like the felony petty theft statute, "creates a substantive offense to be tried in the circuit court." Harris, supra at 317. In neither case is the substantive felony charge equivalent to sentencing under a repeat offender statute such as Florida's habitual offender act, Section 775.084, Florida Statutes (1987). The habitual offender act does not create a new substantive offense, but merely prescribes a longer sentence for subsequent offenses. Eutsey v. State, 383 So.2d 219 (Fla. 1980). In the case of felony petty theft and felony DUI, however, the statutes defining the crimes set forth prior convictions as substantive elements. Therefore, they may not be treated as mere sentencing issues like predicate offenses for habitual offender sentencing.

Statutes such as felony DUI and felony petty theft are recognized as means alternative yet not exclusive to habitual offender sentencing. State v. Fernandez, 156 So.2d 400 (Fla. 2d DCA 1963). In contrast to enhanced punishment statutes, however, under a statute such as that here providing increased punishment for commission of successive related offenses, the previous

convictions are necessary to the conviction for the second offense. On a charge of a subsequent offense, the prior convictions is an essential and necessary element of the crime charged. Sparkman v. State Prison Custodian, 18 So.2d 772 (Fla. 1944); Warren v. State, 74 So.2d 688 (Fla. 1954). Harris also recognizes that phase two must determine the fact of prior convictions as an element of the new charge. 356 So.2d at 317.

This Court in State ex rel. Lockmiller v. Mayo, 101 So. 228, 230 (1924), held that the determination in phase two is to be made by the jury: "We are of the opinion that in such cases the jury should be instructed in the event of finding the defendant guilty, to separately find and state their findings in the verdict whether the defendant had been formerly convicted as charged in the indictment" (emphasis added). See also, Barnhill v. State, 41 So.2d 329 (Fla. 1949). It was also recognized in Johnson v. State, 229 So.2d 13, 14 (Fla. 4th DCA 1969), that phase two must be an "adversary proceeding conducted with all due process safe guards [sic]."

Three means of prosecuting second offenders have been adopted in the United States, and each of them requires a jury determination for phase two. State v. Fernandez, supra at **407**. First, the questions both of guilt and of prior convictions can be submitted to the same jury for consideration at the same time. Second, the two issues can be submitted to separate juries in separate proceedings. Third, the two questions can be submitted to the same jury in the same proceeding with the question of

successive convictions left until after determination of guilt of the substantive offense. Id. The first alternative is explicitly prohibited by Harris,

In choosing between the second and third alternatives, voir dire of the jury during selection is a critical consideration. If the defense is put in the position of having to voir dire about phase two at the beginning of the trial, then the same prejudice guarded against by Harris would be a problem: the jury would be aware of the defendant's prior record as it decides the issue of impairment in phase one. Therefore, in order to comport with Harris, a second jury should be impanelled and voir dired for phase two.

On the other hand, conducting both phase one and then phase two separately before the same jury would be more efficient and would at least preserve the defendant's right to a jury trial on the essential elements of the crime. In the instant case, it would have been no more difficult or time consuming to have had the same jury which found Mr, Rolle guilty reconvened briefly to hear the evidence which was presented to the trial judge (or should have been presented to him, see Point IV). The jury could then have been instructed on the additional single element of prior convictions and asked to deliberate on that single issue and return a finding to the court.[5] Of course, even under this

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[5] Arkansas and Michigan have adopted this procedure in DUI subsequent offender cases, See, Peters v. State, 692 S.W.2d 243 (Ark. 1985), and People v. Raisanen, 319 N.W.2d 693 (Mich.App. 1982). Many other states have adopted similar procedures for various other crimes. See, e.g., State v. Gilbert, 581 P.2d 229 (Ariz. 1978); People v. Bracamonte, 119 Cal.App.3d 644, 174 Cal.Rptr. 191 (1981); People v. District

approach, if in a given case there is an indication that the jury would be prejudiced by its awareness of the evidence supporting the current conviction, then a new jury should be impanelled.[6]

The right to a jury trial in a serious criminal case is a fundamental right, Duncan v. Louisiana, 391 U.S. 145 (1968). Mr. Rolle in the instant case was denied both that right and his rights to due process and a fair trial under Article I, Sections 9, 16, and 22, Florida Constitution, and the Fifth, Sixth, and Fourteenth Amendments, United States Constitution. If this Court does not uphold the District Court of Appeal's decision ordering a new guilt phase trial, or overturn the felony conviction on Point IV, then it must order either a new trial with a jury for phase two, or reduction of the conviction to misdemeanor DUI.

Court, 673 P.2d 998 (Colo. 1983) and People v. Chavez, 621 P.2d 1362 (Colo. 1981); State v. Smith, 282 N.W.2d 138 (Iowa 1979); Williams v. Commonwealth, 644 S.W.2d 335 (Ry. 1982); Poteat v. State, 672 P.2d 45 (Okla.Cr.App. 1983); State v. Moves Camp, 376 N.W.2d 567 (S.D. 1985); Washington v. State, 677 S.W.2d 524 (Tex.Cr.App. 1984); State v. Cameron, 227 A.2d 276 (Vt. 1967); and State v. Bryant, 437 P.2d 398 (Wash. 1968).

6 See, People v. Raisanen, supra at note 3.