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STATE OF FLORIDA,	)	
	)	
Appellant,	)	
	)	
v.	)	CASE NO. 72,383
	)	
CARLTON ROLLE,	)	
	)	
Appellee.	)	

APPELLANT'S REPLY BRIEF

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PRELIMINARY STATEMENT

Appellant, STATE OF FLORIDA, was the prosecution, and Appellee, CARLTON ROLLE, was the defendant, in the trial proceedings held in the Circuit Court of the Fifteenth Judicial Circuit, in and for Palm Beach County, Florida. The State of Florida was designated Appellee and Carlton Rolle, the Appellant, in direct appellate proceedings before the Fourth District Court of Appeal.

In this brief, the STATE OF FLORIDA and CARLTON ROLLE will be referred to as Appellant and Appellee, respectively.

"R" will refer to the Record, as presented before the Fourth District in this case; and the Fourth District's opinion will be referred to, in its slip opinion format.

STATEMENT OF THE CASE AND FACTS

Appellant relies on the Statement of the Case contained in the Initial Brief, at p. 2, and Statement of the Facts, as included in said brief, at 3-6.

POINTS ON APPEAL

POINT I

WHETHER FOURTH DISTRICT ERRED, IN CONCLUDING THAT §316.1934(2)(c), FLA. STAT. (1985) WAS UNCONSTITUTIONALy AS DENIAL OF APPELLEE'S CONSTITUTIONAL RIGHTS OF DUE PROCESS, MERELY ON BASIS OF CONCLUSION THAT JURY INSTRUCTION WAS CONSTITUTIONALLY INVALID?

POINT II

WHETHER FOURTH DISTRICT ERRED, IN CONCLUDING THAT JURY INSTRUCTIONS, INFORMING JURY OF NATURE AND CONSEQUENCES OF PROOF OF .10% BLOOD-ALCOHOL LEVEL, VIOLATED APPELLEE'S DUE PROCESS RIGHTS?

POINT III

WHETHER FOURTH DISTRICT ERRED, IN CONCLUDING THAT ANY ERROR IN GIVING INSTRUCTION TO JURY, ON IMPACT AND EFFECT OF BLOOD-ALCOHOL LEVEL TEST EVIDENCE, WAS NOT HARMLESS ERROR, IN VIEW OF OTHER OVERWHELMING EVIDENCE OF APPELLEE'S INPAIRMENT?

POINT IV

WHETHER THE TRIAL COURT APPROPRIATELY DETERMINED THAT THERE WAS SUFFICIENT PROOF OF PRIOR CONVICTIONSy TO SUPPORT FELONY DUI CONVICTION?

POINT V

WHETHER THE TRIAL COURT APPROPRIATELY DENIED JURY TRIAL, ON ISSUE OF APPELLEE'S GUILT OF FELONY DUI, BY VIRTUE OF PROOF OF PRIOR CONVICTIONS?

SUMMARY OF ARGUMENT

I. Appellee's argument, in basing the invalidity of the statute on the alleged invalidity of the jury instructions, is a mere ''bootstrap" argument, that ignores independent and Constitutional analysis of the statute itself. Appellee's positions have not addressed the distinctions in analysis of statute and instructions, and have virtually conceded the Constitutional validity of the statute.

II. In the event this Court views the instructions as Unconstitutional, this ruling, as a newly-established insufficiency in DUI jury instructions, should be applied prospectively only, based on applicable criteria, and on analogous decisions of this Court in Smith v. State, *13* F.L.W. *43* (Fla. Jan. *21, 1988);* Jackson v. State, 502 So.2d *409* (Fla. *1988);* and State v. Neil, *457* So.2d *481* (Fla. *1984).*

111. In view of overwhelming evidence of the presumed fact of impairment, featuring undisputed evidence of Appellee's physical condition, any error in the jury instructions did not prejudice Appellee, to the extent of reversible error. (See, Initial Brief, at *35-37).*

IV. The State's proof of prior convictions, to establish Appellee's guilt of felony DUI, by evidence of his Florida driving record and certified copies of the judgments of prior convictions, was sufficient and proper to support the conviction. This is particularly true, where Appellee did not specifically contest the truthfulness of the State's proof of prior convictions.

V. Appellee was not entitled to a jury trial, on the separate issue of Appellee's guilt of felony DUI, by proof of prior convictions. Such a procedure was contrary to Appellee's specific request

and agreement with the Court's determination of this issue, and would have further Unconstitutionally prejudiced Appellee, in violation of this Court's opinion in State v. Harris, 356 So.2d 315 (Fla. 1978). Furthermore, because §316.193(2)(b) is a "true recidivist'' statute, Appellee was entitled to and received an adversary proceeding, in accord with due process safeguards.

ARGUMENT

POINT I

FOURTH DISTRICT ERRED, IN CONCLUDING THAT §316.1934(2)(c), FLA. STAT. (1985) WAS UNCONSTITUTIONAL, AS DENIAL OF APPELLEE'S CONSTITUTIONAL RIGHTS OF DUE PROCESS, MERELY ON BASIS OF CONCLUSION THAT JURY INSTRUCTION WAS CONSTITUTIONALLY INVALID.

In his response to Appellant's contentions and arguments, (realleged as if fully set forth herein), that §316.1934(2)(c), Fla. Stat. (1985) was improperly invalidated as Unconstitutional by the Fourth District Court of Appeal, Initial Brief, at 9-24, Appellee has equated the statute on "presumption of impairment," with the jury instructions given. Specifically, Appellee has concentrated on asserting the instructions' alleged flaws, as creating an improper and Unconstitutional mandatory presumption, and "bootstrapped" this analysis, to encompass the statute. Appellee's Brief, at 10-15. This analysis suffers from the same analytical defect, as the Fourt District's review in this case -- the validity of a given jury instruction does not per se dictate the Constitutional validity of the statute it purports to convey. Initial Brief, at 12-18. Appellee has not countered any of the significant and substantial case authorities relied on by Appellant, that demonstrate the legitimate dichotomy between the Constitutional validity of statutes, as opposed to jury instructions on presumption of impairment. (Initial Brief, at 2-18). Furthermore, Appellee's response completely ignores the role of statutory construction, in defining the Constitutionality of this subject statute, (Initial Brief, at 19-21), or appropriate references to simi-

lar language in other Florida penal statutes that have been held to be Constitutionally valid. (Initial Brief, at 21-23).

Furthermore, Appellee's argument appears to concede the validity of Appellant's position that the subject statute ~~is~~ Constitutional. Appellee has initially maintained that the Fourth District's opinion did not invalidate the statutory "presumption of impairment," when said opinion clearly did. See, Response to Motion to Dismiss Appeal, June 13, 1988, at 1-3; Rolle v. State, slip.op., at 1-6. Appellee has taken the alternative position, inherently inconsistent with his challenge to the Constitutionality of the statute, that the allegedly improper instruction is unauthorized by §316.1934(2)(c), supra. Appellee's suggestion that this subsection does no more than place driving under the influence ("DUI") prosecutions before a jury, and beyond a directed verdict, (Answer Brief, at 15-16), is certainly consistent with Appellant's stated position. Initial Brief, at 11-12; 15-18; e.g., County Court of Ulster County, New York v. Allen, 442 U.S. 140 (1979); Barnes v. People, 735 P 2d 869, 873 (Colo 1987); Salazar v. State, 505 So.2d 1287, 1291 (Ala Crim App 1986); Commonwealth v. Crum, 523 A 2d 799, 802 (Pa Super 1987). Appellee's arguments in this regard, and attempts to analyze the statute exclusively by examination of the instructions, effectively supports the State's arguments, that the statute was not an Unconstitutional shifting, of the allocation of the burden of proof, to Appellee.

POINT II

FOURTH DISTRICT ERRED IN CONCLUDING THAT JURY INSTRUCTIONS, INFORMING JURY OF NATURE AND CONSEQUENCES OF PROOF OF .10% BLOOD-ALCOHOL LEVEL, VIOLATED APPELLEE'S DUE PROCESS RIGHTS.

Appellant realleges and relies upon the arguments and authorities contained in its Initial Brief, at 25-34, but wishes to address the tangential contentions by Appellee, that any ruling invalidating the jury instructions herein should be retroactive. (Answer Brief, at 24-25).

Appellee's reliance on Yates v. Aiken, 484 U.S. ___, 108 S.Ct 534, 98 L.Ed.2d 546 (1988), is misplaced. A ruling in this case, that would invalidate jury instructions in DUI cases, based on perceived Francis v. Franklin[1] error, would be a newly recognized insufficiency, as opposed to mere general recognition of the Francis decision itself, in the abstract. Yates, 98 L.Ed.2d, supra, at 554. (Initial Brief, at 31-34). Any such ruling would be equivalent to the defects, expressed as newly recognized, in other decisions of this Court, similarly invalidating criminal jury instructions or procedures, but applying them prospectively only. Yohn v. State, 476 So.2d 123 (Fla. 1985); Smith v. State, 13 F.L.W. 43 (Fla. Jan. 21, 1988)(Yohn not fundamental error, when old instruction, defective under principles of Francis, still not invalidated retroactively); Jackson v. State, 502 So.2d 409, 413 (Fla. 1988)(new procedure in death penalty cases, regarding giving of Enmund v. Florida[2] jury instructions, applied prospectively); State v. Neil,

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1 471 U.S. 307 (1985).

2 458 U.S. 782 (1982).

457 **So.2d** *481, 488* **(Fla.** *1984).* **Any opinion in this case, that would invalidate the jury instructions herein, would still be subject to the governing analysis and case law, relied on by Appellant, in its initial brief. (Initial Brief, at** *31-34).*

POINT III

FOURTH DISTRICT ERRED IN CONCLUDING THAT ANY ERROR IN GIVING INSTRUCTION TO JURY, ON IMPACT AND EFFECT OF BLOOD-ALCOHOL LEVEL TEST EVIDENCE, WAS NOT HARMLESS ERROR, IN VIEW OF OTHER OVERWHELMING EVIDENCE OF APPELLEE'S IMPAIRMENT.

Appellant relies on its arguments and authorities, raised in the Initial Brief, on this point, at 35-37.

POINT IV

TRIAL COURT APPROPRIATELY DETERMINED THAT THERE WAS SUFFICIENT PROOF OF PRIOR CONVICTIONS, TO SUPPORT FELONY DUI CONVICTION.

Appellee has sought to convince this Court to address this ancillary issue, and such issues raised in Point V, infra, in the exercise of its jurisdiction over the appeal of the ruling invalidating the presumption of impairment statute. While Appellant does not question this Court's authority to address these issues, Appellant's contentions of insufficient proof to support his felony DUI conviction, have no substantive merit.

The State's proof of Appellee's prior DUI convictions, consisted of evidence of his Florida driving record, and certified copies of the Records of said past convictions. (R, 308, 311). Appellee's identity was demonstrated, by matching Appellee's date of birth, driver's license number and address, on the prior citations, with those given by Appellee to the officers, and reflected on the citation for the subject DUI herein. (R, 5, 8, 10, 12, 14, 16; 309, 310). It is well-settled that proof of prior convictions, for enhanced punishment purposes, can be established by proof of formal adjudications of guilt, McDonald v. State, 423 So.2d 997, 998 (Fla. 3rd DCA 1982); State v. Davis, 203 So. 2d 160, 162 (Fla. 1967); Shargaa v. State, 102 So.2d 809, 812 (Fla. 1958), cert. denied, 79 S.Ct 114 (1958); Timmons v. State, 119 So. 393, 394 (Fla. 1929); Gordon v. State, 97 So. 428 (Fla. 1923). Such proof can even be sufficiently established, by evidence of uncorroborated PSI reports that are not challenged as untruthful, regarding prior convictions, Lewis v. State, 514 So.2d 389 (Fla. 4th DCA 1987); Johnson v.

State, 472 So.2d 553, 554 (Fla. 5th DCA 1985); Eutsey v. State, 383 So. 2d 219, 225 (Fla. 1980); the use of undisputed computer printouts of such convictions, Minnis v. State, 505 So.2d 17, 18 (Fla. 3rd DCA 1987), and the reading of a defendant's uncorroborated criminal record in open court. Wright v. State, 476 So.2d 325, 327 (Fla. 2nd DCA 1985). Clearly, the proof offered against Appellee, supra, was sufficient, well beyond these requirements. Id. Furthermore, as in Johnson, Eutsey and Minnis, Appellee did not contest the truthfulness of the State's proof of prior convictions. (R, 12; 311-314).

Appellee's argument is premised on the erroneous conclusion that proof of prior convictions, is an essential element of felony DUI. §316.193(2)(b), Fla. Stat. (1985). However, it is clear from the language of this statute, which enhances punishment to felony degrees, upon a defendant convicted of his "fourth or subsequent violation'' of DUI, under §316.193(1), that the nature of this section is "true recidivist." Davis, 203 So.2d, at 162; Eutsey, 383 So.2d, supra, at 223; County of Dade v. Molony, 175 So.2d 238, 239 (Fla. 3rd DCA 1965). The prior convictions are not essential elements of the offense of felony DUI, under §316.193(2)(b), since these former crimes are relevant only to the degree of punishment, are not determinative of guilt of the subject crime, and did not relieve the State from proving the subject DUI against Appellee. Id. This type of enhancement statute substantially differs from other crimes like possession of a firearm by a convicted felon, or escape, where a defendant's ex-felon or prior convicted status is a crucial element of those crimes. Davis, 203 So.2d, at 162 (individual cannot commit possession of firearm by convicted felon,

unless person is an ex-felon); Harris v. State, 449 So.2d 892, 896 (Fla. 1st DCA 1984)(same); Fulford v. State, 113 So.2d 572, 573 (Fla. 2nd DCA 1959)(essential element of crime of escape is that a prisoner escaped while in custody or under conviction for a felony).

Under these circumstances, the State was correctly not placed under an obligation to substantiate its proof of prior convictions, beyond what was established and introduced as evidence. Said proof consisted of far greater substance than mere identity of names between a prior and present conviction. Clinton v. State, 196 So. 684, 685 (Fla. 1940); Thompson v. State, 63 So. 423, 424 (Fla. 1913). Appellee's challenge to the sufficiency of proof has no merit, and does not support the Fourth District's decision to order a new trial for Appellee.

POINT V

TRIAL COURT APPROPRIATELY DENIED JURY TRIAL, ON ISSUE OF APPELLEE'S GUILT OF FELONY DUI, BY VIRTUE OF PROOF OF PRIOR CONVICTIONS.

Appellee has maintained that he was entitled to a jury trial, on the issue of his guilt of felony DUI, and the determination of sufficiency and validity of Appellee's prior DUI convictions. An initial examination of the Record demonstrates that Appellee specifically requested and agreed to a bifurcated proceeding, prior to trial, so that this issue would be considered by the court alone. (R, 19-21). Appellee chose this option, to avoid the prejudicial impact of the State's presentation of evidence of prior offenses to the jury, upon his presumed innocence. (R, 4-5, 19-21). Appellee's present complaint, about the absence of a jury trial, is "invited" error, and entitles him to no relief. Edwards v. State, Case No. 87-1372 (Fla. 4th DCA, July 13, 1988), slip op., at 3; Pope v. State, 441 So.2d 1073 (Fla. 1983). In any event, it is completely illogical to maintain that a jury trial was necessary, since such presently requested remedy would have created the very prejudice Appellee's trial counsel sought to avoid. State v. Harris, 356 So.2d 315, 317 (Fla. 1978).

Appellee has additionally maintained that Harris, supra, supports his contention. However, this Court provided for the same type of procedure in Harris, that was employed by the trial court herein. (R, 306-320). Additionally, because the statute in question is purely recidivist in nature, supra, Point IV, Appellee was merely entitled to an adversary proceeding, with all available due process safeguards of representation by counsel, and opportunities to present and rebut evi-

dence. Eutsey, 383 So.2d, supra, at 223-224; §775.084(3), Fla. Stat. (1977); Johnson v. State, 329 So.2d 13, 14 (Fla. 4th DCA 1969); Davis, supra; Molony, supra. The Record demonstrates that such safeguards were provided to Appellee. (R, 306-320).

The remedy requested herein by Appellee is both unwarranted, and Constitutionally improper under Harris, supra. The trial court's adversary proceedings were appropriate, and do not compel reversal for a new trial.

CONCLUSION

WHEREFORE, based on the foregoing arguments and authorities cited herein, and in the Initial Brief, Appellant respectfully requests that this Honorable Court reverse the ruling of the Fourth District; uphold the Constitutionality of the subject statute and instructions herein; and remand the proceedings to the Fourth District, with instructions to reinstate Appellee's conviction and sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Appellant's Reply Brief has been furnished, by courier, to ALLEN J. DeWEESE, ESQUIRE, Assistant Public Defender, The Governmental Center, 301 North Olive Avenue, 9th Floor, West Palm Beach, Florida 33401, this 19th day of July, 1988.

Richard G. Burton

Of Counsel