IN THE SUPREME COURT OF FLORIDA

BARBARA ANN MAGAW,

Appellant,

v.

CASE NO. 72,419

STATE OF FLORIDA,

Appellee.

_____/

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Barbara Ann Magaw was the defendant below, the Appellant in the District Court of Appeal and will be referred to herein as Petitioner or Magaw. The State of Florida was the prosecution below and will be referred to herein as Respondent or the State. The record on appeal consists of two volumes of trial transcript, pages 1-334. The record also contains transcript of proceedings regarding pretrial motions and sentencing. All transcripts are consecutively pagenated and will be designated by the symbol "R" followed by the appropriate page number in parantheses. The opinion below is reported as Magaw v. State, 523 So.2d 762 (Fla. 1st DCA 1988).

STATEMENT OF THE CASE AND FACTS

Terri Ann Kimbrel, age twenty-two (22), testified that she had known Barbara Ann Magaw as a friend for six years. She described her as brown hair, brown eyes, about 5 foot two inches. (R 19). On July 1, 1986, Kimbrel and Magaw went to the beach. Magaw drank two or three beers and ate Kentucky Fried Chicken. Magaw and Kimbrel attended a rock concert that evening. Magaw drank another beer before attending the concert and consumed more alcohol at the concert. Kimbrel and Magaw went to the lounge at the Hilton Hotel. (R 24). Magaw had two or three more beers at the Hilton. (R 27). Magaw and Kimbrel left the Hilton and went to the Kings Inn Lounge, where Magaw had nothing further to drink. (R 27). Magaw left the Kings Inn Lounge to go home between approximately 12:30 a.m. to 1 a.m..

The State then called Michael Drlicka, a employee of Channel 44 in Pensacola. Drlicka left work at approximately 12:30 a.m. and, after stopping at a Burger King, he began to cross the Pensacola Bay bridge. (R 41). Prior to the accident, he was passed by a small pick-up truck, he guessed it was traveling seventy to eighty miles an hour. (R 42). He saw sparks along the guard rail and eventually came upon a scene which looked like an accident. There was a large

tool box and engine parts strewn about the bridge. (R 42). He thought he could smell alcohol coming from the cab of the truck driven by Barbara Magaw. The little truck which had passed him was the only vehicle to pass him after he came upon the bridge. (R 43). He identified a picture of Barbara Ann Magaw's truck as the truck he saw that night. (R 44). Drlicka gave a statement one week after the accident which he described Magaw's driving as very erractic. (R 49).

The State next called Justin Lejune, a deputy sheriff for the Orange County Texas Sheriff's Department, who was also driving on the Pensacola Bay bridge on the morning of July 2, 1986. (R 52). He had also observed Barbara Magaw's truck passing at an extremely high rate of speed as he entered on the bridge. (R 53). Upon arriving at the scene of the accident, Lejune rushed over to the vehicle and opened the door to see if the occupant was alright. The occupant was a young lady in a semi-conscious state. The occupant spoke with a slurred form of speech saying, "What about the babies? See about the children". (R 54). Lejune could smell alcohol coming from the cab of the truck. It was very strong. (R 54). Lejune testified that as a deputy sheriff he had come

in contact with lots of drunks and in his opinion, the occupant of the truck was drunk. (R 55-56). He based his opinion on her "slurred speech, her disorientation and strong odor of alcohol". He could observe no visible signs of injury. (R 56).

Officer Mike Thompson testified that he was called to the scene that evening and was able to observe Magaw. He could smell alcohol on her. He would describe the smell of alcohol as very strong. (R 64). His experience as an officer had allowed him to observe a thousand or more drunk or intoxicated people in his career. (R 64). There was no doubt in his mind that Magaw was intoxicated, heavily drunk. (R 65). He based his opinion on the fact that she was very talkative and repetitive and often her response did not match the question I had asked. He saw no apparent injuries. (R 65-66). Thompson requested the emergency medical people draw a blood sample to determine her blood alcohol level. (R 66).

A visual examination of the guard rail and Magaw's pick-up truck revealed presence of blue transfer paint. Magaw's truck was white. The truck driven by the victim, Ray Barnes, Jr., was blue. (R 69; 105).

Joy Dixon, a medical technologist, testified that she drew a sample of blood from a lady named Barbara Magaw at 1:47 a.m. on July 2, 1986. (R 84).

On recall, Officer Mike Thompson testified he initially asked Magaw if another vehicle was involved in the accident and she said no. He asked her again and her answer was "I don't know, I don't know". She eventually indicated that another vehicle was involved. (R 96).

Clarence West, a crime scene analyst, identified the vehicle recovered from the water as a blue 1977 Chevrolet pick-up. (R 105).

Thomas Wood, of the Florida Department of Law Enforcement, performed a blood alcohol analysis on the sample taken from Barbara Magaw. (R 114). He determined the blood alcohol level to be .25 grain ethal alcohol per 100 millimeters of blood. (R 115).

Doctor McConnell, a pathologist, performed an autopsy on the body of victim Ray Barnes, Jr. McConnell said that Barnes died from drowning. (R 137). Barnes had a negative blood alcohol level. (R 138).

SUMMARY OF ARGUMENT

ISSUE I

Legislative revision of the DWI Manslaughter Statute did not significantly alter the previously interpreted intent of the Legislature to impose strict liability for the operation of a vehicle while intoxicated which causes the death of any person. The Legislature has created statutes which impose a negligence requirement as an element of a traffic offense. However, the Legislature had never included such language in DWI Manslaughter Statute and there is not basis for receding from this Court's prior interpretation of the elements of the offense of DWI Manslaughter.

ISSUE II

The trial court is afforded wide latitude in ruling on the admissibility of evidence. The Appellant has failed to demonstrate the trial judge abused his discretion in allowing the State to read into the record a deposition taken by Appellant's trial counsel. The State offered defense counsel an opportunity to read a deposition of the same witness which did include cross-examination by defense counsel. However, the defense counsel declined.

ISSUE III

In the essential element of DWI Manslaughter is the death of a victim, therefore, the trial court properly awarded points for death or severe injury in compiling the guidelines scoresheet. On the other hand, if Appellant would prefer the points not be scored when the case should be remanded then the case should be remanded with the trial court given the opportunity to depart from the guidelines based upon victim injury.

ISSUE IV

The scoring of prior convictions is irrelevant as the guidelines would remain the same. Appellant was sentenced within the recommended range and therefore the issue is moot.

ARGUMENT

ISSUE I

IS THE HOLDING OF ARMENIA V. STATE 497 SO.2D 638 (FLA. 1986) STILL VALID IN LIGHT OF SECTION 316.193(3)(c) FLORIDA STATUTES SUPP. (1986).

The answer is yes. Section 316.193(3)(c), Florida Statutes Supp. (1986), does not differ in meaning or intent from Section 316.1931, Florida Statutes (1983). Either statute requires the State to prove that a death was caused by an intoxicated person who was operating a vehicle.

The rationale of Baker v. State, 377 So.2d 17 (Fla. 1979), finding a legislative intent to hold those who operate a vehicle while intoxicated is strictly liable for any death they cause applies with equal force to the language of the amended or revised statutory scheme. The revision in no way diminishes the strict liability of the intoxicated driver for the resulting death. The repeal of 316.1931 and its re-enactment as 316.193(3)(c), was an effort by the Legislature to harmonize the competing definitions of impairment which previously existed under law. Section 316.193, Florida Statutes (1985), defined driving under the influence (DWI) as operating a vehicle when affected by alcohol or other substances "to the extent that his normal faculties are

impaired" or having a blood alcohol level of 0.10 percent. Similarly, 316.1931, Florida Statutes (1985), defined driving while intoxicated "DWI" as operating a vehicle under the influence of alcohol or other substance when affected to such "extent to deprive him of full possession of his mental faculties". The different definitions for DUI and DWI resolted in needless confusion. The revision of 316.193, in 1986, applies a single standard and eliminates the distinction between DUI and DWI. The purpose of the revision was to eliminate DWI.

The new defined offense of DUI Manslaughter set forth in 316.193(3)(c), Florida Statutes Supp. (1986), includes new language to-wit: "Who, by reason of such operation, causes the death of any human being". The District Court below suggests that this new language imposes a causation element which did not exist by word or in court construction under the old law. In essense, the District Court concluded that the newly revised statute specifically rejects the rationale of Baker v. State, supra, and Armenia v. State, 497 So.2d 638 (Fla. 1986).

The change in the statutory definition is a distinction with a difference. The phrase "by reason of such operation

causes death" is no different than "if the death of any human being is caused by the operation of a motor vehicle by a person while intoxicated", found in the now repealed 316.1931 and the prior 860.01(2) statute. The State is still required to prove the defendant merely operated the vehicle while under the influence.

The Legislature could have used language such as by manner of such operation which would required the State to prove an element beyond simple operation and impairment. For instance, the Legislature could have created an offense vehicular homicide while under the influence which would require the State to prove the killing of a human being by the operation of a motor vehicle by another in a reckless manner likely to cause death and stated proof of impairment may be admissible to establish recklessness. This statutory offense would preclude liability for Justice Boyd's hypothetical drunk driver at the stoplight as the added element of likely to cause death could now be proved merely by sitting there in a drunken state.

However, the law merely made gramatical changes to the DWI Manslaughter Statute which made the language consistent

with that applied to the drunk driver who cause only property damage or injury less than death. See Section 316.193(2)(a)(b), Florida Statutes (1983), which is consistent with the State's position that 316.193 was amended merely to harmonize the statutory scheme and create one offense, driving under the influence, in order to eliminate DUI/DWI dichotomy on the definition of impairment.

Moreover, as recently stated by this Court in State v. Jackson, 13 F.L.W. 352 (Fla. June 2, 1988):

> "It is axiomatic that where the Legislature had defined a crime in specific terms, the court's are without authority to define it differently. See State v. Graydon, 506 So.2d 393 (Fla. 1987). An exception is made where literal interpretation of a statute yields absurd results. See Williams v. State, 472 So.2d 1051 (Fla. 1986). Criminal statutes are to be construed strictly in favor of the accused".

Presumably, this Court was aware of these principles when the decisions in Baker and Armenia were issued and acted accordingly. The Court, in Baker, refused to graft an element of approximate causation into the DWI Manslaughter Statute where non was apparent on the face of the record. The Court recognized, in Baker, that approximate causation is an element of proof for a

Manslaughter conviction based on culpable negligence under Section 782.07, Florida Statutes (1977), citing to Thompson v. State, 108 Fla. 370, 146 So. 201 (1953). The clearest and most precise method for the Legislature to revisit the Baker decision and overrule it would have been to adopt the approximate causation language of Section 782.07 as discussed supra. It is clear that they did not.

The phrase "by reason of such operation" when given its plain meaning precludes any consideration of the manner in which the vehicle was operating and suggests the fact of operation per se as the basis for liability. This was the same conclusion this Court drew in Baker in rejecting Justice Boyd's hypothetical "absurd result". Even if there was a subjective intent on behalf of the Legislature to impose a causation element, the choice of words used to affectuate their intent falls short of the mark by any objective analysis and this Court is not free to invent by conjecture what the Legislature failed to do in word and deed.

The pervasive campaign against drunk driving is the best evidence that the Legislature still intends to impose a strict liability for driving under the influence which causes death.

Therefore, Section 316.193(3)(c) is a rational response to a real problem. The deterrent value of a public policy of punishment for drunk drivers is as valid today as it was at the time of Baker and Ingram v. Pettit, 340 So.2d 922 (Fla. 1976). This statistics regarding fatalities resulting from accidents where drinking was a contributing factor, do not reflect in any way that the problem of drunk drivers has diminished over time.

The best evidence that the Legislature knows how to craft a causation element in a statute may be found in other statutes set forth in Chapter 316. For instance, Section 316.192 defines reckless driving as "willful and wanton disregard" for the safety of citizens or property. Likewise, 316.1925 punishes the failure to drive in a careful and prudent manner under the careless driving statute. The situation here is similar to that presented when the Legislature enacted Section 782.071, Florida Statutes (1975). This Court held in McCreary v. State, 371 So.2d 1024 (Fla. 1979), that the Legislature did not intend to reduce the crime of Manslaughter by culpable negligence in the operation of a motor vehicle to a third degree felony identified as vehicular homicide, but rather intended and did include a lesser included offense with a lesser standard

of proof required for conviction. The argument presented by Magaw suggests that the Legislature intended to merge the offenses of DUI Manslaughter and Manslaughter involving culpable negligence which are both second degree felonies. However, if the Legislature did intend an element of causation, they did not give any guidance as to what the proper standard of proof is for conviction.

Likewise, there is no language describing the necessary degree of causation as in the case of culpable negligence which has been defined as gross and flagrant character evincing reckless disregard for human life and the like. Filmon v. State, 336 So.2d 586 (Fla. 1976); and McCreary v. State, supra. Trial counsel's request that he be allowed to argue causation to the jury could have only confused the situation. For example, defense counsel would obviously prefer to have the standard be flagrant and the judge could decide to allow the willful or wanton standard of reckless driving. The clear language of the statute is that no causation evidence or argument is required.

The newly revised DUI Manslaughter standard and jury instructions list three elements, (1) Defendant operated a vehicle, (2) Defendant, "by reasons of such operation, caused

the death of the victim", and (3) At the time of such operation, the Defendant was under the influence or had a blood alcohol level of 0.10.

Counsel for Respondent would also note that a retrial of Barbara Magaw would expose her to dual convictions for DUI Manslaughter and vehicular homicide even though there was only one death given the legislative revision of Section 775.021(4) in response to Carawan v. State, 515 So.2d 161 (Fla. 1987).[1] It is now unambiguous that the legislature intends to allow separate convictions for a single act where the statutory elements of the offenses are different contrary to this Court's opinion in Houser v. State, 474 So.2d 1193 (Fla. 1985).

It is a well known principle of law that a legislative revision to clarify pre-existing statutory intent relates back to the original passage of the statute. Lowry v. Florida Parole and Probation Commission, 473 So.2d 1248 (Fla. 1985); Brooks v. State, 478 So.2d 1052 (Fla. 1985). Thus, Section 775.021(4), Florida Statutes (1983) must now be construed consistent with Justice Alderman's dissenting opinion in Houser.

[1]A copy of Section 7 of enrolled Senate Bill 307 is included as Respondent's Appendix.

ISSUE II

THE TRIAL COURT DID NOT ERR IN ALLOWING THE PROSECUTION TO READ INTO EVIDENCE THE DEPOSITION TAKEN AND PERPETUATED BY THE PETITIONER.

Respondent agrees with the proposition that it is well settled that a fair and full cross-examination of witness upon the subjects open by direct examination is an absolute right to be afforded a criminal defendant. Coco v. State, 62 So.2d 892 (Fla. 1953).

However, Magaw's claim that the trial court improperly limited her right to cross-examination by admitting the deposition of Officer Sanderson is misplaced. Appellant cannot complain about her failure to attend her own deposition of a witness and also there has been no attempt to explain how Officer Sanderson's testimony in any way prejudiced Magaw. There was overwhelming evidence presented at trial by other state witnesses which conclusively demonstrates that Barbara Magaw was driving seventy to eighty miles an hour with a blood alcohol level of .25 and had blue paint on her vehicle similar to that on Mr. Barnes' truck. Magaw has failed to demonstrate that the trial court abused her discretion in allowing the admission of the deposition, the perpetuated testimony of Officer Sanderson. A mere claim of abuse of discretion does not establish the palpable abuse of discretion required to

reverse the trial court for the admission of evidence. Jent v. State, 408 So.2d 1024 (Fla. 1981). The cases relied upon by Petitioner for the most part involve instances where right of cross-examination was restricted at trial before the jury. Petitioner Magaw has not explained how this error, if indeed there was error, was not harmless under the test set forth in State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

ISSUE III

THE TRIAL COURT DID NOT ERR IN ASSESSING POINTS FOR VICTIM INJURY ON MAGAW'S GUIDELINES SCORESHEET.

Florida Rule of Criminal Procedure 3.701 includes DWI/Manslaughter as a category 1 murder/manslaughter offense. One of the elements of DWI/Manslaughter is that the victim is dead. Proof of the death of the victim is therefore an element of the defense. The trial court correctly scored twenty-one points for victim injury. However, if the points for victim injury are not to be included in DWI/Manslaughter then Respondent respectfully asks this Court declare that the fact that the victim is dead is a valid reason for departure in all DWI/Manslaughter cases. After all, killing someone reasonably justifies the imposition of a fifteen year sentence.

ISSUE IV

THE TRIAL COURT DID NOT ERR IN SCORING APPELLANT'S 1982 CONVICTION FOR A FIRST-DEGREE MISDEMEANOR AS A THIRD-DEGREE FELONY.

A complained of error is once again irrelevant for purposes of this sentence. If at some other time Appellant is to be sentenced under a new guidelines scoresheet, she will have the opportunity to have this point corrected. Otherwise, this simple housekeeping matter does not affect this sentence which would be within the same guidelines range regardless of the scoring of this conviction.

CONCLUSION

The question certified below should be answered in the affirmative. The revision of the DUI statute merely harmonized the definition of impairment for pusposes of defining DUI and DUI/Manslaughter in consistent language. The Legislature knows how to include specific elements of causation in criminal statutes and have done so in other crimes defined under this same uniform traffic code chapter of the Florida Statutes. However, they did not include such language in this revised statute. There is no basis to recede from existing case law. The trial court correctly denied Magaw's request to argue causation to the jury. This court should deny all claims for relief and affirm the judgment and sentence below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Mr. Keith D. Cooper, Esq., 900 N. Palafox Street, Pensacola, Florida 32501, this 5TH day of July, 1988.

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