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FILED
SID J. WHITE
AUG 1 1988
CLERK, SUPREME COURT
By _____ Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

BARBARA ANN MAGAW,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT ESCAMBIA COUNTY, FLORIDA

CIRCUIT COURT NO. 86-3947
DISTRICT COURT NO. BS-353
SUPREME COURT NO. 72,419

APPELLANT'S REPLY BRIEF

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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)?

Appellee argues that the statutory revisions were merely an attempt to harmonize the two differing standards of impairment, and that the question of causation was not a concern of the legislature. While it is true that harmonizing "impairment" and "under the influence" was an important purpose of the revision, it was not the sole purpose, nor the sole effect.

A careful examination of documents and transcriptions of the committee and floor hearings on the then proposed revisions shows the fallacy of the state's argument. On June 19, 1986, 18 days prior to the date of offense, a discussion was held on the floor of the Florida Senate. This discussion concerned House Bill 8-B, the very same bill that was subsequently passed by the full legislature and became the law we are concerned with today. The relevant portion of this discussion has been transcribed and is included at page A-1 of the appendix. On page A-4 the legislative intent vis-a-vis causation is made clear:

> Senator Langley: There was one intent question we needed on the bill I wanted to address to Senator Weinstein, Mr. President.
>
> Mr. President: Okay. Senator Weinstein takes the floor and yields to a question.
>
> Senator Langley: Senator Weinstein, the bill analysis says, and I understand the language on page three, I believe, is supposed to put into the new law that causation is necessary rather than just intoxication on

vehicle homicide. Is that correct, sir?

Senator Weinstein: Senator Langley, that -- page five I think you're referring to.

Senator Langley: Yes, sir.

Senator Weinstein: The new language does have the word cause, and I think it's the intent of the drafters of the bill that causation be a factor in a DUI manslaughter conviction.

Senator Langley: Thank you, Senator.

The bill was then read for the third time by the title only and passed. (Appendix Page A-4-5).

The staff analysis referred to in the above debate is also included in the appendix on page A-6. On page A-8 the analyst writes, "The law presently requires no causal connection between the defendant's intoxicated condition and the resulting death". This statement is explained on page A-12 where the analyst notes; "Since Cannon v. State was decided in 1926 the Florida Supreme Court has consistently held the offense of DWI manslaughter to be a strict liability crime." Thus, the analyst's conclusion as to "the present state of the law" was based on the Supreme Court's decisions, not their knowledge of the original legislative intent. As to the DUI manslaughter statute, the analyst makes the intent very clear. On page A-9, she writes, "Secondly, there now must be a 'causal connection' between the operation of the vehicle by the offender and the resulting death." On page A-12, she writes:

> This legislation requires a causal connection between the driver's conduct (the operation of a motor vehicle) and the resulting accident. Since

> Cannon v. State was decided in 1926 the Florida Supreme Court has consistently held the offense of DWI manslaughter to be a strict liability crime. In Baker v. State, 277 So2d 17 (1979) [Sic] the Florida Supreme Court stated "statutes which impose strict criminal liability, although not favored, are nonetheless constitutional." However, as Justice Boyd pointed out in his dissenting opinion in that case,
>
> > 'Under this law as construed by the Court today, the following application is possible. An intoxicated person drives an automobile to an intersection and properly stops at a stop light. While there in a stationary position, the vehicle is struck from behind by another automobile due to negligent operation by the driver. The negligent driver dies from injuries received in the collision. The completely passive, non-negligent but intoxicated motorist can be convicted of DWI manslaughter and imprisoned for fifteen years.'
>
> This bill would insert the element of causation into the definitions of DUI crimes which call for increased penalties due to accidents involving serious bodily injury or death.
>
> (Appendix Page A-13).

Additionally, if the legislature wanted causation to be irrelevant to the offense, they had ample opportunity to do so. Senate Bill 1218, which was not passed, would have amended Section 316.193, Florida Statutes to provide, "[(3)](c) "A person who is convicted of a violation of subsection (1) [DUI], who by reason of the operation of a vehicle causes the death of any human being, shall be deemed guilty of manslaughter and shall be punished as provided by existing law relating to manslaughter. Negligence and proximate causation are not elements of this offense." Since this language was specifically rejected, the only reasonable conclusion is that the changes were made to

express the legislative intent that causation be an element.

This also rebuts the other arguments of Appellee's counsel. The above senate bill retained the former (under 316.1933) placement of the word "causes". Thus, if the legislature had merely wanted to incorporate the death and injury/enhanced penalty provisions of 316.1933 into 316.193 without requiring causation (as Appellee argues), they could have easily done so by enacting the above Senate Bill rather than overtly changing the language as in the enacted bill.

Lastly, Senator Weinstein's answer to Senator Langley: "The new language does have the word 'cause' [Sic], and I think it's the intent of the drafters of the bill that causation be a factor..." further indicates that "causes" means "causes" and rebuts Appellee's claim that only "manner" could mean "cause". (Appendix Page A-4). Giving words their plain and ordinary meaning, how could the legislature make it any clearer that they mean "cause" than by using that word? For that matter, how could they have made it any clearer in the DWI manslaughter statute that Appellant was convicted under? What word more clearly denotes "cause" than "cause"? Counsel for Appellee would have this court ignore the expressed legislative intent because he does not approve of their "choice of words". It is not for Appellee to approve or disapprove and it is not for the Court (absent a vague, overbroad, or otherwise constitutionally infirm statute) to substitute its preference for the clear and expressed legislative intent.

As this Court stated in 1987;

> In Florida, it is settled law that rules of construction serve no purpose other than assisting the courts in ascertaining the true legislative intent behind a particular ambigous statute and carrying that intent into effect to the fullest degree possible. State ex rel. Florida Jai Alai, Inc. v. State Racing Comm'n, 112 So2d 10, 11 (Fla.1966); In re Estate of Jeffcott, 186 So.2d 80, 84 (Fla. 2d DCA 1966). So important is legislative intent that we previously have characterized it as the "polestar" by which the court must be guided.

Carawan v. State, 515 So.2d 161, 166-67 (Fla. 1987).

Appellee's argument concerning the ability to refile on Appellant for both DWI manslaughter and vehicular homicide is of no import to this case, other than to state that Appellant is pleased that Appellee agrees that legislative revisions should be used to express prior legislative intent, thus changing the interpretation of the prior statute.

The expressed legislative intent precludes answering the certified question in any manner other than "No".

ISSUE II

THE TRIAL COURT ERRED IN ALLOWING THE PROSECUTION TO DENY APPELLANT HER RIGHTS TO CONFRONTATION AND CROSS-EXAMINATION BY READING INTO EVIDENCE A DEPOSITION TAKEN AND PERPETUATED BY THE DEFENSE, INSTEAD OF PERPETUATING ONE THEMSELVES OR PRESENTING THE WITNESS FOR LIVE TESTIMONY.

Obviously, while a defendant may choose not to attend a normal discovery deposition or a deposition perpetuated by her trial counsel for use at trial (if her trial counsel sees fit), certainly a Defendant would appear at trial where witnesses are called to testify against her by the State. A deposition perpetuated by the State is in fact, part of the live trial of the Defendant. This is because the perpetuated testimony of a State witness is in lieu of his presence at trial. At such a perpetuated deposition, the Defendant is therefore afforded the right to cross-examination as well as lead the witness. To now imply that she cannot complain since she did not attend the perpetuation of Officer Scotty Sanderson's deposition is to say the State can have part of her trial without her, although she had not been advised that the trial was taking place.

Certainly, the safeguards inherent in Fla. R. Crim. P. 3.190 (j)(6) providing for notice to the Defendant, as well as the tender of expenses of travel and subsistence for attendance at the examination of a witness whose testimony is being perpetuated by the State, are there to insure that the rights and safeguards afforded to a Defendant when

the State is perpetuating the deposition of a witness are the same as those for a Defendant who is confronting an adverse witness at trial.

Appellant in her initial brief stated the testimony by Officer Scotty Sanderson that was prejudicial to her at her trial (Appellant's Main Brief Page 22). This was not the testimony of a minor or inconsequential witness. In addition, while the Appellee argues that there was "overwhelming" evidence presented at trial by other state witnesses "which conclusively demonstrates that Barbara Magaw was driving seventy to eighty miles per hour with a blood alcohol level of .25 and had blue paint on her vehicle similar to that on Mr. Barns' truck" (Answer Brief of Appellee Page 16), it is interesting that the Assistant State Attorney at trial did not find the evidence so overwhelming and conclusive that he forwent the use of Officer Sanderson's perpetuated deposition. Obviously, the State Attorney trying the case would be in a better position to make this determination than Appellee Counsel.

ISSUE III

THE TRIAL COURT ERRED IN ASSESSING POINTS FOR VICTIM INJURY ON APPELLANT'S SCORESHEET, SINCE APPELLANT WAS NOT CONVICTED OF CAUSING ANYONE'S DEATH.

Appellee would have this Court believe that simply because death of the victim is an element of DWI Manslaughter that the issue is closed. The committee note to Florida Rule of Criminal Procedure 3.701 clearly shows that this is not the case. The question is not so much whether the victim is dead, but whether the defendant caused the death of the victim. If causation need not be proved then the defendant has not been convicted of injuring anyone and victim injury points should not be scored. Accord, Motyka v. State, 457 So. 2d 1114, 1115 (Fla. 1st DCA 1984); Benedict v. State, 475 So.2d 1000, 1001 (Fla. 5th DCA 1985).

Counsel for Appellee attempts to justify ignoring the intent of the committee, as expressed in the committee notes, because "after all, killing someone reasonably justifies the imposition of a fifteen year sentence," Counsel for Appellee conveniently forgets his argument that Barbara Magaw should be convicted of DWI manslaughter regardless of whether she killed anyone; that being drunk, driving and being involved in an accident in which someone dies would be enough, regardless of whose fault it was. Counsel for Appellee clearly wants it both ways. He wants to be able to obtain a conviction for DWI manslaughter without having to prove that the defendant caused the death

(or for that matter, even the accident), yet he wants it conclusively presumed that he proved causation when it comes time for sentencing. If causation is an element of DWI manslaughter, them victim injury may be assessed. If it is not, then victim injury may not be assessed. Appellee must chose one or the other, he cannot constitutionally be allowed both.

ISSUE IV

THE TRIAL COURT ERRED IN SCORING APPELLANT'S 1982 CONVICTION FOR A FIRST DEGREE MISDEMEANOR AS A THIRD DEGREE FELONY.

Counsel for Appellee argues that "this simple housekeeping matter does not affect this sentence which would be within the same guidelines range regardless...". Appellee is incorrect. When coupled with the 21 points erroneously added for victim injury, this sentencing error resulted in Appellant being placed in a higher guidelines cell. Thus, the cumulative effect is much more than a "simple housekeeping matter". Were it only a "housekeeping matter", would not Appellee concede the error?

CONCLUSION

The certified question must be answered "No". The legislative history of the DUI manslaughter statute shows the clear, expressed, and unambiguous legislative intent that causation is an element of DUI manslaughter. Appellee apparently agrees that subsequent revisions may be used to demonstrate the legislative intent of the pre-revision statute. Thus, the express legislative intent indicates that causation is an element of DWI manslaughter as well. Since Barbara Magaw was precluded from arguing that she was not the cause of Ray Barnes' death, the case should be remanded for a new trial, with instructions that the state prove causation as an element of DWI manslaughter.

The trial court also erred in allowing the prosecutor to read into evidence, during its case-in-chief, a deposition perpetuated by Appellant's trial attorney. This was in clear violation of her Sixth Amendment rights under the U.S. Constitution.

The trial court also erred determining the proper sentence. Since causation was not an issue in Appellant's trial, she was not convicted of causing the death of anyone. Thus, victim injury points could not properly be assessed against her. Additionally, since Appellee makes no attempt to rebut Appellant's assertion that her prior first degree misdemeanor conviction was improperly scored as a third degree felony, Appellee may be considered to have stipulated

to this issue.

Appellant's case should be remanded for a new trial based on the errors discussed in issues one and two. Only if the court grants relief as to issue one and conviction is obtained on retrial may victim injury points be assessed. Otherwise, the victim injury points must be ordered removed from Appellant's scoresheet and the case remanded for re-sentencing. In any event, the case must be remanded with instructions to correct the improper scoring of Appellant's prior first degree misdemeanor conviction.