IN THE SUPREME COURT OF FLORIDA

CASE NO. 73,636

DANIEL FIESELMAN,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

****

ON PETITION FOR DISCRETIONARY REVIEW

****

BRIEF OF RESPONDENT'S ON THE MERITS

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INTRODUCTION

The Petitioner, **Daniel Fieselman,** will be referred to as the Defendant. The Respondent, the State of **Florida,** will be referred to as the State. The letter "R" will designate the record on appeal and the letter "A" will designate the Appendix to the brief. All emphasis has been supplied unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

The Third District in Fieselman v. State, 537 So.2d 603 (Fla. 3 DCA 1988) succinctly stated the case and facts as follows:

> Daniel Fieselman was charged in the county court with being in actual physical control of a vehicle while under the influence of alcoholic beverages, in violation of Section 316.193(1)(a), Florida Statutes (1985). Fieselman moved to dismiss the charge on the ground that the undisputed facts established that, although he was indisputably under the influence, he was not in actual physical control of the vehicle. The county court dismissed the charge, and the State appealed to the circuit court, which, sitting in its appellate capacity, reversed the county court's order and remanded the cause for further proceedings. The defendant has petitioned this court to issue a writ of certiorari to review the circuit court's order. We deny the defendant's petition.

* * * * *

II

We turn now to the merits of the controversy. The facts are undisputed: At about 3:10 a.m., the defendant was found lying down asleep in the front seat of his automobile. His car was in a parking lot, the car's automatic gear shift was in the park position, its key was in the ignition in the off position, its "lights" [2] were on, and its engine, not running, was cold.

With considerable difficulty-presumably because the defendant was intoxicated-a police officer woke the defendant. Observing the defendant's condition and taking into account the above-described circumstances (but discounting the lack of any direct evidence that the defendant had driven the car in his intoxicated state), the officer placed the defendant under arrest for violating Section 316.193(1), Florida Statutes (1985), which provides that a person who is under the influence of, inter alia, alcoholic beverages is guilty of driving under the influence "if such person is ... in actual physical control of a vehicle within this state...."

The issue before us, as the reader by now surely knows, is whether, as the county court believed, Fieselman was *as a matter of law* not in actual physical control of the vehicle in which he was found under the influence of alcoholic beverages, or whether, as the circuit court later ruled, the question of Fieselman's actual physical control *vel non* was one for the jury to decide.[3]

Id at 604-605

> [2] It is not clear from the meager record before us whether the lights referred to are the car's headlamps, parking lights, or interior lights.
>
> [3] The issue is not whether the defendant was "operating" the vehicle within the meaning of the statute, *see State v. Daly*, 64 N.J. 122, 313 A.2d 194 (1973), and there is no claim that the vehicle was inoperable so as to make it impossible for one to be in actual physical control of a vehicle which falls within the statute, see Jones v. State, 510 So.2d 1147 (Fla. 1st DCA 1987); *Johnson v. State*, 518 N.E.2d 1127 (Ind.Ct.App. 1988).

Prior to reaching the merits, the Third District sua sponte, recognized conflict with Baker v. State, 518 So.2d 457 (Fla. 5 DCA 1988) on the scope of certiorari jurisdiction from an order of a circuit court acting on its appellate. The Third District based on the following rationale found that it had certiorari jurisdiction. (A.2).

> I.
>
> We consider first whether the decision of the circuit court is one properly reviewable by certiorari.
>
> In *Baker v. State*, 518 So.2d 457 (Fla. 5th DCA 1988), the Fifth District refused to exercise its certiorari jurisdiction to review a circuit court's reversal of a county court's order dismissing a criminal information. Its reasoning was succinct: a circuit court's order on appeal reversing a county court's dismissal and a circuit court's order at the trial level denying a motion to dismiss "amount to the

same thing"; and since, without dispute, the latter is unreviewable by certiorari, the former is likewise unreviewable. Id. at 458.

[1] We do not agree that a trial court order denying a motion to dismiss criminal charges "amounts to the same thing" as a decision of a court, sitting in an appellate capacity, which reverses a trial court's dismissal of criminal charges. To be sure, in each instance the criminal charge remains pending in the trial court, and a plenary appeal to the court having appellate jurisdiction will lie from a future conviction. And, ordinarily, the availability of an eventual plenary appeal is said to bar certiorari review of an interlocutory decision of a trial court denying a motion to dismiss. ***Martin-Johnson, Inc.*** *u.* ***Savage,*** 509 So.2d 1097 (Fla. 1987); ***Brooks*** *v.* ***Owens,*** 97 So.2d 693 (Fla. 1957; ***Kilgore*** *u.* ***Bird,*** 149 Fla. *570*, 6 So.2d 541 (1942). However, in our review, this oft-stated rule does not bar certiorari review of an ***appellate*** decision of a circuit court which reverses a trial (county) court's order granting a motion to dismiss.

[2] The sole criterion for certiorari review of a circuit court appellate decision is whether the decision departs from the essential requirements of the law, *Combs* *v.* ***State,*** 436 So.2d 93 (Fla. 1983) ***see also City of Deerfield Beach*** *u.* ***Vaillant,*** 419 So.2d 624 (Fla. 1982), and the availability vel non to the ultimately convicted defendant of an adequate remedy by appeal is simply irrelevant.[1] This is because, unlike a trial court decision which concerns and binds only the immediate litigants, an appellate decision-including, of course, one by the circuit court-establishes law

> beyond the case in which the decision is rendered. Even as the availability of an adequate remedy by appeal in the event of ultimate conviction is not a ground upon which the Florida Supreme Court would deny certiorari review of an appellate decision of a district court reversing a trial court's dismissal of criminal charges, it is not a ground for denial of certiorari review in the present case. We thus find no impediment to our certiorari jurisdiction and in this respect, disagree and certify conflict with the Fifth District's decision in ***Baker v. State,*** **518** So.2d **457.**
>
> Id. at **604**

[1] In *Combs,* the supreme court modified the decision in Combs v. State, **420** So.2d **316** (Fla. 5th DCA 1982), in which the Fifth District had adopted, as it later did in ***Baker,*** a similarly narrow view of its certiorari jurisdiction over circuit appellate decisions.

On the merits of the case the Third District found, after reviewing the law from other jurisdiction, that the evidence of the key in the ignition along with the Defendants presence asleep and intoxicated in the vehicle was sufficient to allow the case to go to the trier of fact. Since the issue was for the trier of fact to decide, it precluded the conclusion that as a matter of law the Defendant was not in actual physical control of the vehicle and therefore precluded dismissal of the charges. (A.3-5).

This appeal then followed.

POINT INVOLVED ON APPEAL

WHETHER THE THIRD DISTRICT ERRED IN ITS EXERCISE AND APPLICATION OF ITS CERTIORARI JURISDICTION.

SUMMARY OF THE ARGUMENT

The Third District certified conflict with Baker v. State, 518 So.2d 457 (Fla. 5 DCA 1988) on the issue of the scope of certiorari jurisdiction from an order from the circuit court acting in its appellate capacity. The Third District found, contrary to the Fifth District, that certiorari jurisdiction does lie to review a circuit court order reversing a county court's order which dismissed charges. The Court found that the Fifth District's analysis was overly restrictive and rejected the same. By so doing the Court found it had jurisdiction to determine if the circuit court departed from the essential requirements of law when it overturned the county court order of dismissal. The State agrees with the Third District on the jurisdictional question.

Since this matter is before this Court solely on the jurisdictional issue, the Court should use it's prerogative and refuse to review the merits of the decision. By so doing, this Court would approve of the sound reasoning and judgment on this issue by the Third District.

If this Court decides to reach the merits, then it should affirm the Third District's decision in total. The reason therefore is that the language in actual physical control should

be liberally construed to effectuate the purpose of the statute, to wit: to keep drunk drivers off the roads. Here the keys were in the ignition and all that was required to operate the vehicle while inebriated was for the Defendant to wake up and turn the key. Once the motor was running, the Defendant could have caused the harm associated with driving drunk. That is why the fact that the key was in the ignition; along with the fact that Defendant was drunk and sleeping in his car, is sufficient to send the matter to the trier of fact.

ARGUMENT

THE THIRD DISTRICT DID NOT ERR IN ITS EXERCISE AND APPLICATION OF ITS CERTIORARI JURISDICTION.

The Third District has certified conflict with the Fifth District's decision in Baker v. State, supra, concerning the scope of the District Court's certiorari jurisdiction to review orders of the circuit court issued in its appellate capacity. The State agrees with the Third District that "[t]he sole criterion for certiorari review of a circuit court appellate decision is whether the decision departs from the essential requirements of the law, ..., and the availability vel non to the ultimately convicted defendant of an adequate remedy by appeal is simply irrelevant." Fieselman v. State, 537 So.2d 603, 604 (Fla. 3 DCA **1988).** See also Mitchell v. State, **14** F.L.W. **390** (Fla. **4** DCA, Feb. **8, 1989).**

Inasmuch as the only issue that was certified as conflict was the jurisdictional issue, the State urges this Court to use its prerogative and not review the merits of the decision. If this Court decides to reach the merits then the State submits that the Third District's decision on the merits should be affirmed.

In the instant case the Third District found that where the keys are in the ignition of a vehicle and Defendant was asleep lying down on the front seat, the evidence was sufficient as a matter of law, to let the trier of fact determine the cause. This was so eventhough the transmission was not engaged, the car was in a parking lot and the engine cold. This holding requires affirmance when the statute is viewed in its proper perspective.

The Legislature can enact reasonable regulations for drivers of automobiles on the theory that driving is "affected with a public interest." The phrase affected with a public interest means that the activity involved affects the health, safety and welfare of the people and the public is interested to such an extent that reasonable laws can be enacted for its control and regulation. McRae v. Robbins, 151 Fla. 109, 9 So.2d 284 (1942). Laws prohibiting a person from driving while intoxicated are "affected with a public interest" and as such are liberally interpreted in favor of the public interest and against the private interest of the driver involved. State Dept. of Public Safety v. Juncewski, 308 N.W. 2d 316, 319 (Minn. 1981).

In the instant case, Defendant was charged under section 316.193(I), Florida Statutes (1985) which provides that a person who is under the influence of alcoholic beverages is guilty of driving under the influence if he is in actual physical control

of a vehicle. In accordance with the foregoing principles, the phrase "actual physical control," should be liberally interpreted in favor of the public interest. The public interest involved has been stated as follows:

> We believe that an intoxicated person seated behind the steering wheel of a motor vehicle is a threat to the safety and welfare of the public. The danger is less than where an intoxicated person is actually driving a vehicle, but it does exist. The defendant when arrested may have been exercising no conscious violation with regard to the vehicle, still there is a legitimate inference to be drawn that he placed himself behind the wheel of the vehicle and could have at any time started the automobile and driven away. He therefore had "actual physical control" of the vehicle within the meaning of the Statute.
>
> Hughes v. State, 535 P.2d 1023, 1025 (Okl.Cr.1975).

Applying the foregoing statutory interpretation and public policy to the instant case, clearly supports the Third District's holding that the Defendant was in "actual physical control'' of his vehicle. Here, the Defendant was asleep across the front seat of his car, with the keys in the ignition. All he had to do was wake up while still inebriated, turn the key, start the car and drive away. This is the exact evil the statute was enacted to regulate, and therefore requires a finding that as long as the key is in the ignition along with

evidence of intoxication, a defendant, as a matter of law, can be prosecuted under the foregoing statute. The instant decision has already been followed in Florida. Mitchell v. State, supra (Defendant in actual physical control of vehicle where he was found at 1:00 a.m., slumped over the steering wheel of an automobile parked in the parking lot of a Burger King restaurant, with the keys in the ignition, the engine off and the lights off). Other jurisdictions have also found that a determining factor is whether the keys were in the ignition. Wafford v. State, 739 P.2d 543 (Okl.Cr. 1987); State v. Hall, 353 N.W. 2d 37 (S.D. 1984); State v. Thurman, 348 N.W. 2d 776 (Minn. App. 1984); Wiyott v. State, 284 Ark. 399, 683 S.W. 2d 270 (1985); Lopez v. Schwendiman, 720 P.2d 778 (Utah 1986); State v. Trucott, 145 Ut.274, 487 A.2d 149 (1984).

Petitioner contends that regardless of whether the facts were sufficient to establish "actual physical control" he still cannot, as a matter of law, be convicted because the vehicle was inoperable. This position was not raised below and in fact the Third District specifically considered the car operational in reaching the instant result. Id. at 605, n 2 and 3.

CONCLUSION

Based on the foregoing points and authorities, the State respectfully urges this Court to affirm the instant decision of the Third District.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of **RESPONDENT'S BRIEF ON THE MERITS** was furnished by mail to M. **LEWIS HALL 111,** Attorney for Petitioner, 150 S.E. 2nd Avenue, Suite 1400, Miami, Florida 33131 on this 31 day of March, 1989.

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