IN THE SUPREME COURT OF FLORIDA

CASE NO. **73,636**

Third District Court of Appeal
No. **87-2155**

DANIEL FIESELMAN,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

APPEAL FROM THE THIRD DISTRICT COURT OF APPEAL
IN AND FOR DADE COUNTY, FLORIDA

PETITIONER'S REPLY BRIEF

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REPLY AND REBUTTAL

I. Certiorari Jurisdiction

The Answer Brief of the State agrees with the Petitioner that certiorari review is available for a circuit court appellate decision reversing the trial court. It is acknowledged by the State that the sole criteria for certiorari jurisdiction is a departure from the essential requirements of law. In support of this proposition, the State cites both Fieselman v. State, 537 So.2d 603 (Fla. 3rd DCA 1988) and Mitchell v. State, 538 So.2d 106 (Fla. 4th DCA 1989).

The Petitioner recognizes that state attorneys throughout the State of Florida may differ in opinion depending upon the facts of the particular case before the court. The Fifth District has recently revisited its certiorari jurisdiction established by Baker v. State, 518 So.2d 457 (Fla. 5th DCA 1988). Judge Dauksch, speaking for the court in Williams v. State, ____ So.2d ____ (Fla. 5th DCA 1989), suggests that:

> There is no need for second-level appellate intrusion into a criminal case unless a conviction results. Otherwise, the number of interlocutory appeals will increase and no real appellate need will be served.

Id. at _____.[1]

The Fifth District has expressed direct conflict with Fieselman v. State, 537 So.2d 603 (Fla. 3rd DCA 1988), and Mitchell v. State, 538 So.2d 106 (Fla. 4th DCA 1989).

The Third District Court of Appeal and the Fifth District Court of Appeal have now expressed direct conflict over the issue of the appellate court's certiorari jurisdiction. Further confusing the issue is the decision of the Fourth District court of Appeal in Mitchell adopting the reasoning of Fieselman and expressing direct conflict with Baker v. State, 518 So.2d 457 (Fla. 5th DCA 1988). Thus, if this Court exercises its discretion and denies review on the merits of the Fieselman decision as the

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[1] Williams v. State, ___ So.2d ___ (Fla. 5th DCA 1989), Appendix 1, Copy of opinion of the Fifth District Court of Appeal.

State requests, the conflict between the District Courts will not be resolved. Petitioner urges this Court to accept the entire case.

11. Actual Physical Control

The State suggests in its brief that the Legislature acted properly in enacting **$316.193,** Fla. Stat. The Petitioner is in agreement on this narrow point. The Legislature may enact reasonable regulations for drivers of automobiles. The Petitioner, however, strongly disagrees with the State's assertion that the only elements required for a conviction of the crime of actual physical control of a motor vehicle under §316.193, Fla. Stat., are (1) the keys in the ignition and (2) evidence of intoxication.

Petitioner argues in his Main Brief that there are elements to every crime for which the prosecution has the burden of proof as to all such elements. The Petitioner strongly contends that one of the elements to the crime of actual physical control established by **§316.193,** Fla. Stat., is an operational vehicle. It is evident that the State seeks to create an additional presumption expanding **§316.193** (b), Fla. Stat., in order to overcome problem areas in the case at bar. Therein the presumption of impairment is created when a person's blood alcohol level is .1% or higher. Petitioner contends that this presumption is the only

presumption intended by the Legislature. Further presumptions suggested either by the State, the Third District Court in Fieselman v. State, 537 So.2d 603 (Fla. 3rd DCA 1988), or by the First District Court in Jones v. State, 510 So.2d 1147 (Fla. 1st DCA 1987), will violate the appellant's right to due process under the Fourteenth Amendment to the United States Constitution.

If the State's argument is to be followed, then the keys in the ignition of the automobile along with a person being seated or lying down in the automobile would be sufficient to establish actual physical control. In order to draw this conclusion, the State must assume that the automobile was operable. The State does not take issue with the proposition that one charged with actual physical control of a vehicle should not be prosecuted if the vehicle is indeed inoperable. As stated in the Jones case:

> It readily appears that a person ought not be convicted of having a vehicle under his or her control while intoxicated, when in fact the vehicle was inoperable...
>
> Id. at 1149.

Neither does the State dispute the logic that the Legislature did not intend S316.193, Fla. Stat., to include inoperable motor vehicles. As the State's brief indicates, reasonable regulations promulgated by the Legislature are designed to protect drivers of automobiles and preclude such action which affects the public interest. The public interest which the Legislature intended to

protect is the right of citizens of this State to drive on public highways without the danger associated with the action of inebriated drivers on those public highways. Cincinnati v. Kelley, 47 Ohio St.2d 94, 351 N.E.2d 85 (1976). Clearly, an inoperable automobile with no sign of physical damage parked in a private parking lot does not affect the public interest. There is no clear and present danger to any member of the public for which $316.193, Fla. Stat., was designed to protect. If the analysis of the Petitioner is correct thus far, the Court must address whether it is appropriate to presume that an automobile is operational where there is no evidence to the contrary.

As a matter of Constitutional law, the due process clause of the Fourteenth Amendment of the United States Constitution protects an accused against conviction except upon proof beyond a reasonable doubt of each and every fact necessary to constitute the crime with which the accused is charged. Henderson V. Kibbe, 431 U.S. 145 (97 S.Ct. 1730, 52 L.Ed.2d 203 (1977). Notwithstanding the pronouncement by the Supreme Court of the United States in Henderson that the State must prove every fact necessary to constitute the crime, the State and all Florida appellate courts considering the question have created a presumption that an automobile is operable unless there is evidence to the contrary. The State contends that the keys in the ignition

together with the defendant's presence in the vehicle are sufficient to establish the elements of actual physical control. The First District in Jones v. ~~State~~, 510 So.2d 1147 (Fla. 1st DCA 1987) likewise creates a presumption that the motor vehicle is operable and suggests that its inoperability may be a defense raised by the defendant. Such presumptions are not authorized by S316.193, Fla. Stat., or the common law of this State. Indeed, if the presumption made by the First District and the State were to be added to $316.193, Fla. Stat., the Petitioner submits that the statute would be unconstitutional on its face under the principles of Mullaney ~~v. Wi~~lber~~,~~ ~~421~~ U.S.~~—~~ 684 (1975).

In Mullaney, the State of Maine required the defendants to prove that they acted in the heat of passion in order to reduce the crime of murder to manslaughter. Once the prosecution demonstrated that a homicide was intentional and unlawful, malice was conclusively presumed unless the accused proved by a preponderance of the evidence that he acted in the heat of passion. Since malice was an element of murder, Maine's presumption unconstitutionally shifted the burden of proof from the prosecution to the defendant. Thus, under the Mullaney test, the presumption created by the First District and suggested by the State as a legally-created addition to S316.193, Fla. Stat., renders the Statute unconstitutional on its face. If the presumption is

allowed to stand, Petitioner's rights under the Fourteenth Amendment have been infringed.

The ~~Mul~~laney case stands as a beacon against attempts to shift the burden of proof to the accused. A presumption which meets the due-process requirement of Mullaney may nevertheless be unconstitutional as applied to the particular set of facts. The two leading Supreme Court cases on constitutionally-applied presumptions are Tot v. United States, 319 U.S. 463 (1943) and Leary v. United States, 395 U.S. 6 (1969). In ~~Tot~~, a previously-convicted felon was found in possession of a loaded, automatic pistol. It was unlawful under the Federal Firearms Act for a convicted felon to possess any firearm which had been shipped in Interstate Commerce. Although there was no evidence that the firearm had been shipped in Interstate Commerce, the Act provided that the possession of a firearm by any person should be presumptive evidence that the firearm was shipped in Interstate Commerce. The Supreme Court in finding a violation of due process articulated what is now commonly referred to as the "Tot Test". the Tot Test states:

> A statutory presumption cannot be sustained if there is no rational connection between the fact proved and ultimate fact presumed...
>
> Id. at 467.

~~Tot~~ was later modified in Leary v. United States, 395 U.S. 6 (1969). The Leary case involved a defendant convicted of

transporting and concealing marijuana under a statute which held that possession of the drug gave rise to a presumption that the accused knew of its illegal importation. The Court held that it was arbitrary to infer that the defendant knew of the drugs illegal importation. In Leary, a stricter test was announced. Thus, under Leary, a presumption will be considered irrational and arbitrary unless it can be said with substantial assurance that the presumed fact more likely than not flows from the fact proved.[2]

Applying the "Leary Test" to the case at bar, it cannot be said with substantial assurance that the vehicle in which the Petitioner was found was more likely than not operational from the fact that the keys were found in the ignition. Any number of circumstances could have occurred resulting in an inoperable automobile at the time of the Petitioner's arrest. The automobile could have run out of fuel or incurred mechanical difficulties. Thus, under Tot as modified by Leary, a presumption that the automobile was operational renders §316.193, Fla. Stat., unconstitutional as applied by violating the Petitioner's right to due process.

This Court should endeavor to construe §316.193, Fla. Stat., constitutionally. In order to reach such a construction, the Court must set out the elements of the crime which the State is

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[2]Leary v. United States, 395 U.S. 6, 36 (1969).

required to prove beyond a reasonable doubt. The required elements, as set out in Petitioner's Main Brief, are described in Key v. Town of Kinsey, 424 So.2d 701 (Ala. Cr. App. 1982) and in Cagel v. City of Gadsden, 495 So.2d 1144 (Ala. 1986). Under the Cagel "totality-of-circumstances" test, the elements are (1) active or constructive possession of the vehicle ignition keys by the person charged, (2) possession of the person charged in the driver's seat in such a condition that except for intoxication he is physically capable of starting the engine and causing the vehicle to move, and (3) a vehicle that is operational. All of these elements may be established from the total circumstances of the case. In addition, there may be other circumstances which would warrant consideration in determining a person's guilt under the accusation of physical control. Of all the elements, an operable vehicle is the most critical element to be proven by the State. The State's brief has not disputed that a vehicle capable of operation is an element to an offense charged under §316.193, Fla. Stat.

If operability is a critical element, one may question how a person charged with violation of §316.193 resulting in an accident from which the automobile is rendered inoperable may ever be convicted. The answer is found in the "totality-of-the-circumstances" test. The State may show through other

circumstances that the automobile was rendered inoperable by reason of vehicle damage resulting from the operation of the automobile by the person charged. In such cases, the evidence of damage to the automobile may be used to explain why the automobile was inoperable. In the alternative, the State may introduce evidence that the engine was warm or that the vehicle started at the arresting officer's direction.

Finally, the State's brief misconstrues the argument of the Petitioner in suggesting to this Court that the Petitioner believed his automobile to be inoperable and, thus, as a matter of law, could not be convicted of the crime of actual physical control. Petitioner has contended in all proceedings that an operable vehicle is an element of proof required of the State. The State has no evidence whatsoever which would tend to prove that the vehicle in which Petitioner was sleeping was operable. The officer did not attempt to start the vehicle. The engine was cold. The vehicle was parked on private property. No one observed the vehicle being driven. There is simply no evidence from which one could infer that the vehicle in which the Petitioner was sleeping was operable.

The State cannot prove this case without the presumption that the automobile was operable. The Third District recognized the presumption of operability in its footnote to the opinion in this

case.[3] Such a presumption not only violates the circumstantial evidence rule as set forth in the Main Brief of Petitioner, but also the Petitioner's rights to due process under the Fourteenth Amendment to the United States Constitution.

III. Conclusion

For the reasons stated herein and those set forth in the Main Brief, Petitioner submits that it would be appropriate for this Court to accept jurisdiction in this case, hold that certiorari jurisdiction is appropriate under the circumstances and the opinion of the Third District Court of Appeal should be reversed. The trial court's dismissal of the charges against the Petitioner should be reinstated.

Respectfully submitted,

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[3] Figselman v. State, 537 So.2d 603, 605 (Fla. 3rd DCA 1988), Note 3, "...there is no claim that the vehicle was inoperable so as to make it impossible for one to be in actual physical control..."

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing PETITIONER'S MAIN BRIEF was mailed to Richard *L.* Kaplin, Esquire, Assistant Attorney General, 401 N. W. 2nd Avenue, Suite 820, Miami, Florida 33128, this 17th day of April, 1989.

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