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IN THE SUPREME COURT OF FLORIDA

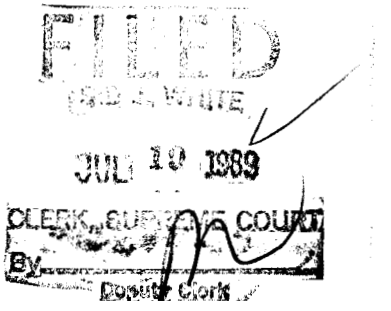
MICHAEL J. WILHELM,

Petitioner,

vs. Case No. **74,345**

STATE OF FLORIDA,

Respondent.



DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

INITIAL BRIEF OF PETITIONER ON THE MERITS

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT
FLORIDA BAR NO. **0143265**

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ATTORNEYS FOR PETITIONER

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PRELIMINARY STATEMENT

The Petitioner, Michael J. Wilhelm, was the defendant in the trial court and the appellant in the District Court of Appeal, Second District. The Respondent, the State of Florida, was the plaintiff in the trial court and the appellee in the Second District.

Petitioner seeks review of the Second District's decision which affirmed his conviction and sentence for DWI manslaughter on the ground that the trial court's error in giving an unconstitutional chemical test jury instruction was harmless. The Second District certified the question of the constitutionality of the instruction as one of great public importance. The decision is set forth in full in the appendix to this brief.

References to the appendix are designated by **"A"** and the page number. References to the record on appeal are designated by "R" and the page number.

STATEMENT OF THE CASE

On July 3, 1986, the State filed an amended information in the Circuit Court for Lee County charging the Petitioner, MICHAEL J. WILHELM, with manslaughter, driving while intoxicated (DWI) manslaughter, and vehicular homicide for causing the death of Donald Lawson Jr. on June 8, 1986, in violation of section 782.07, Florida Statutes (1985), section 316.1931, Florida Statutes (1985), and section 782.071, Florida Statutes (1985). (R392)

Petitioner was tried by jury before the Honorable Thomas S. Reese, Circuit Judge, on April 22-24, 1987. (R1) The jury found Petitioner guilty of DWI manslaughter but not guilty of the other two charges. (R386, 387, 420)

On May 7, 1987, the court adjudicated Petitioner guilty of DWI manslaughter, sentenced him to seven years imprisonment in compliance with the guidelines, fined him $10,000 plus a 5% surcharge and $250 in costs, and revoked his driver's license for seven years. (R424, 425, 431-433, 436-438)

On June 14, 1989, the District Court of Appeal, Second District affirmed Petitioner's conviction and sentence. (A5) The court held that the trial court's chemical test jury instruction violated due process by creating a mandatory rebuttable presumption of impairment, but the error in giving the instruction was harmless. (A4, 5) The court certified the question as one of great public importance. (A5)

STATEMENT OF THE FACTS

It was raining around **6:00** p.m. on the evening of June **8, 1986,** when a semi-tractor driven by Petitioner skidded across the center line on San Carlos Boulevard near Fort Myers Beach. The truck collided with the Lawson family station wagon and a taxi driven by Joseph Venuto. **(R15-18, 33-35, 49, 55, 135, 136, 139-142, 154-157, 163-165, 173, 276-279, 293-297)** Venuto testified that Petitioner appeared to be incapacitated and reeked of alcohol. **(R160, 161)** Seven year old Donald Lawson Jr., a passenger in the back seat of the station wagon, suffered severe head injuries and died on the way to the hospital. **(R18, 22, 152, 153, 180, 181, 187, 190-193)**

State Trooper Howard Cole investigated the accident. **(R32)** Cole testified that Petitioner appeared to be intoxicated and did not perform well when given field sobriety tests. **(R36, 37, 45-48, 67, 79-81, 87, 88)** Petitioner told Cole he drank only one beer with dinner around **3:00** or **4:00** p.m. and had taken Nyquil for a cold. **(R50-52, 89, 90)** When Petitioner refused consent, Cole and another trooper used force to assist a paramedic in taking a sample of Petitioner's blood. **(R40-44, 60, 61, 93, 98, 100-104)**

FDLE chemist Stephen Layton tested the sample and found a blood alcohol level of **0.20%.** **(R238-243, 250, 251)** He calculated that Petitioner would have to drink 16 ounces of Nyquil to produce that result. **(R353-357)**

Three other State witnesses testified about the apparent inebriation of a truck driver at a bar on the day of the accident. (R196-216) The court granted defense counsel's motion to strike their testimony because they failed to identify either the driver or his truck. (R227-229, 267-270, 275)

Petitioner testified that he drank one beer with his lunch around 2:00 p.m. (R287, 333, 337, 344) He took a nap and woke up around 6:00 p.m. (R287, 288, 333) He consumed the remaining contents of a bottle of Nyquil, about one or one and a half inches of it, because he had a cold. (R290, 337, 344) He did not feel the effects of the alcohol. He knew what he was doing and drove in a responsible manner. (R322) The collision occurred when his truck skidded across the center line when he applied his brakes because cars in front of him were slowing down. (R293-297)

Defense counsel objected to the State's requested jury instruction on the chemical test on the ground that the instruction was for driving under the influence and was not part of the standard instruction for DUI manslaughter. (R222, 223) The court overruled the objection. (R233)

The court gave the chemical test instruction:

> Regarding the chemical test, if you find from the evidence:
> First that the defendant had point zero five percent or less by weight of alcohol in his blood, he is presumed not to be under the influence of alcoholic beverages to the extent his normal faculties are impaired.
> You may disregard this presumption if it is rebutted by other evidence.
> Two, that the defendant had in

> excess of point zero five percent but less than point one zero percent by weight of alcohol in his blood, there is no presumption that the defendant was or was not under the influence of alcoholic beverages to the extent his normal faculties were impaired.
>
> Such fact, however, may be considered with other competent evidence in determining whether the defendant was under the influence of alcoholic beverages to the extent his normal faculties were impaired.
>
> Third, that the defendant had point one zero percent or more by weight of alcohol in his blood, it is prima facie case that the defendant was under the influence of alcoholic beverages to the extent his normal faculties were impaired.

(R376, 377)

After the chemical test instruction, the court gave the jury the standard instructions on presumption of innocence, the burden of proof, and reasonable doubt. **(R377, 378)**

SUMMARY OF THE ARGUMENT

The only substantial issue regarding Petitioner's guilt or innocence of DWI manslaughter was whether he was intoxicated. The court gave a chemical test jury instruction which created a mandatory rebuttable presumption that Petitioner was intoxicated if his blood alcohol level exceeded 0.10%. This instruction violated the Due Process Clause of the Fourteenth Amendment. This violation of due process was fundamental error. The error cannot be found harmless because there is a reasonable possibility that it contributed to Petitioner's conviction. The conviction must be reversed for a new trial.

ARGUMENT

ISSUE I

THE TRIAL COURT VIOLATED THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT BY INSTRUCTING THE JURY TO APPLY A MANDATORY REBUTTABLE PRESUMPTION ON THE ISSUE OF PETITIONER'S INTOXICATION.

The State charged Petitioner with DWI manslaughter in violation of section 316.1931, Florida Statutes (1985). (R392) At trial it was undisputed that Petitioner was the driver of the truck which collided with the Lawson family station wagon and that a death resulted from the collision. (R15-18, 33-34, 49, 55, 135, 236, 239-242, 154-157, 163-165, 173, 276-279, 293-297)

The only substantial issue regarding Petitioner's guilt or innocence of DWI manslaughter was whether Petitioner was intoxicated. Section 316.1931 required the State to prove that Petitioner was in an intoxicated condition or under the influence of alcoholic beverages to such extent as to deprive him of full possession of his normal faculties. Taxi driver Joseph Venuto testified that Petitioner appeared to be incapacitated and reeked of alcohol. (R160, 161) Trooper Howard Cole testified that Petitioner appeared to be intoxicated and did not perform well when given field sobriety tests. (R36, 37, 45-48, 67, 79-81, 87, 88) A chemical test conducted upon a sample of Petitioner's blood revealed a blood alcohol level of 0.20%. (R238-243, 250, 251) However, Petitioner told Cole and testified at trial that he drank only one beer and took some Nyquil for a cold. (R50-52, 287, 290,

337, 344) Petitioner further testified that he did not feel the effects of the alcohol, knew what he was doing, and drove in a responsible manner. (R322)

Over defense counsel's objection (R222, 223), the court instructed the jury:

> Third, that the defendant had point one zero percent or more by weight of alcohol in his blood, it is prima facie case that the defendant was under the influence of alcoholic beverages to the extent his normal faculties were impaired.

(R377)

Black's Law Dictionary (5th ed. 1981) defines prima facie case as, "Such as will prevail until contradicted and overcome by other evidence. ... [I]t is the evidence necessary to require defendant to proceed with his case." Thus, the chemical test instruction essentially told the jury that proof of a blood alcohol level of 0.10% or more satisfied the State's burden of proof on the issue of Petitioner's impairment and required Petitioner to produce evidence to the contrary.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution prohibits the State from using evidentiary presumptions in a jury instruction which relieve the State of its burden of persuasion beyond a reasonable doubt of every essential element of a crime. Francis v. Franklin, 471 U.S. 307, 313, 105 S.Ct. 1965, 85 L.Ed.2d 344, 352 (1985). A mandatory rebuttable presumption requires the jury to find the presumed element if the State proves certain predicate facts unless the

defendant persuades the jury that such a finding is unwarranted. 471 U.S. at 314 n.2, 85 L.Ed.2d at 353 n.2. Thus, a mandatory rebuttable presumption relieves the State of the affirmative burden of persuasion on the presumed element and is unconstitutional. 471 U.S. at 317, 85 L.Ed.2d at 355.

A similar Florida jury instruction, stating that a defendant's failure to spend funds properly shall constitute prima facie evidence of intent to defraud, was held unconstitutional because it could be interpreted by the jury to create a mandatory rebuttable presumption in Miller v. Norvell, 775 F.2d 1572 (11th Cir. 1985). The First and Fourth District Courts of Appeal found that the decisions in Francis and Miller required them to hold that the Florida chemical test jury instruction could be interpreted as a mandatory rebuttable presumption and therefore violated due process in Frazier v. State, 530 So.2d 986 (Fla. 1st DCA 1988), and Rolle v. State, 528 So.2d 1208 (Fla. 4th DCA 1988). The Fourth District reiterated the Rolle holding in Yost v. State, 542 So.2d 419 (Fla. 4th DCA 1989). The Second District followed Frazier, Rolle, and Yost in holding the chemical test instruction unconstitutional in Petitioner's case. (A4)

Defense counsel's objection to the chemical test instruction failed to apprise the trial court of the due process violation presented by Petitioner's appeal.[1] (R22, 223) But this

[1] Because Francis v. Franklin was decided in 1985, well before Petitioner's trial in April, 1987 (R1), defense counsel should have been aware of the basis for asserting a violation of due process. Should this Court find that the failure to make the proper objection waived this issue for appeal, Petitioner will have a

Court defines fundamental error as error which amounts to a denial of due process. In Castor v. State, 365 So.2d 701, 704 n.7 (Fla. 1978), the Court declared, "For an error to be *so* fundamental that it may be urged on appeal though not properly preserved below, the asserted error must amount to a denial of due process." Since the chemical test instruction in this case violated due process, as held in Frazier and Rolle, the error was *so* fundamental that no objection was required under the Castor rule.

Moreover, the giving of a misleading jury instruction has been held to constitute fundamental error. Doyle v. State, 483 So.2d 89, 90 (Fla. 4th DCA 1986); Carter v. State, 469 So.2d 194, 196 (Fla. 2d DCA 1985). The reason the chemical test instruction violated due process is that the instruction may have misled the jury into believing that the State need only prove a blood alcohol level of 0.10% and that no further proof by the State or determination by the jury needed to be made. Rolle v. State, 528 So.2d at 1209. Due process requires that "it be made clear to the jury that the presumption is purely permissive and that the assessment of the underlying facts and the weight to be accorded them is entirely within the jury's determination." 528 So.2d at 1210. Since the instruction was misleading on an essential matter to be proved by the State and violated the requirements of due

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legitimate claim of ineffective assistance of trial counsel to raise in a motion for post-conviction relief under Florida Rule of Criminal Procedure 3.850. **See** Spaziano v. State, 522 So.2d 525 (Fla. 2d DCA 1988) (failure to object to incomplete and misleading jury instructions in homicide case was ineffective assistance).

process, the trial court committed fundamental error in giving the instruction.

The harmless error standard of Chapman v. California, **386** U.S. **18, 87** S.Ct. **824, 17** L.Ed.2d **705 (1967),** applies to jury instructions which violate the principles of Francis v. Franklin. Rose v. Clark, **478** U.S. **570, 106** S.Ct. **3101, 92** L.Ed.2d **460 (1986).** In this case, the Second District misapplied the harmless error standard to Petitioner's appeal. The court ruled that the error in giving the unconstitutional jury instruction was harmless because the court found overwhelming evidence that Petitioner was under the influence of alcohol to the extent his faculties were impaired. **(A4, 5)**

Petitioner does not agree that the evidence of his intoxication was overwhelming. The State's evidence of Petitioner's intoxication **(R36, 37, 45-48, 67, 79-81, 87, 88, 160, 161, 238-243,** 250, **251)** was contradicted by Petitioner at trial. **(R287-290, 203-297, 333, 337, 344)**

More importantly, this Court has repeatedly rejected the consideration of the weight or sufficiency of the evidence, even when characterized as overwhelming, in applying the harmless error standard. State v. Lee, **531** So.2d **133, 136-137** (Fla. **1988);** State v. DiGuilio, **491** So.2d **1129, 1139** (Fla. **1986).** This Court explained the proper application of the harmless error test in DiGuilio:

> The test is not a sufficiency-of-the-evidence, a correct result, a not clearly wrong, a substantial evidence, a more probable than not,

> a clear and convincing, or even an overwhelming evidence test. Harmless error is not a device for the appellate court to substitute itself for the trier-of-fact by simply weighing the evidence. The focus is on the effect of the error on the trier-of-fact. The question is whether there is a reasonable possibility that the error affected the verdict. The burden to show the error was harmless must remain on the state. If the appellate court cannot say beyond a reasonable doubt that the error did not affect the verdict, then the error is by definition harmful.

491 So.2d at **1139.**

When there is a reasonable possibility that a misleading jury instruction contributed to the defendant's conviction, the error is not harmless. Butler v. State, **493** So.2d **451, 453** (Fla. **1986).** Since the only significant issue at trial was whether Petitioner was intoxicated, there is more than a reasonable possibility, there is a substantial likelihood that the unconstitutional chemical test instruction contributed to Petitioner's conviction. The judgment and sentence must be reversed and the cause remanded for a new trial.

CONCLUSION

Petitioner respectfully requests this Honorable Court to affirm that portion of the decision of the Second District which holds that the trial court erred in giving an unconstitutional chemical test jury instruction, quash that portion of the decision which holds the error harmless, reverse Petitioner's conviction, and remand for a new trial.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to the Tampa Attorney General's Office on this 14th day of July, **1989.**

Respectfully submitted,

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