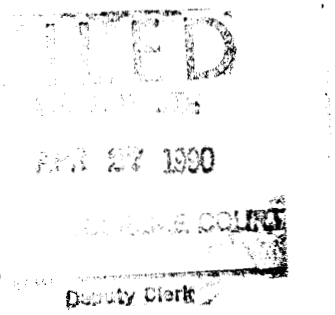
IN THE SUPREME COURT OF FLORIDA



ROBERT LEWIS MILLER,

Petitioner,

v. CASE NO. 74,955

STATE OF FLORIDA,

Respondent.

_____/

ON DISCRETIONARY REVIEW FROM THE
SECOND DISTRICT COURT OF APPEAL, STATE OF FLORIDA

BRIEF OF RESPONDENT ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Respondent relies on the factual findings made by the district court below in Miller v. State, 549 So.2d 1106 (Fla. 2d DCA 1989). In addition, Respondent relies on the additional facts as follows.

Petitioner failed to slow down for a school zone. (R. 764). Respondent was travelling approximately fifty miles per hour in a thirty-five mile per hour speed zone. He passed right through a parking lot during the chase. (R. 449). He travelled roughly four miles before the crash occurred. (R. 207). About 50 cars had to swerve to avoid colliding with Petitioner's vehicle. (R. 453). His speed, while charging headlong against the flow of traffic, varied between forty-five and eighty miles per hour. (R. 485, 529, 530, 581, 312, 327, 338). Petitioner thought it appropriate to smile and wave while being pursued by the police. (R. 363, 377-78). He flashed his lights so that oncoming drivers would move out of his apparently rightful way. (R. 413, 425).

SUMMARY OF THE ARGUMENT

Failure to give the long form instruction on excusable or justifiable homicide was not error. The evidence simply did not support an instruction on excusable or justifiable homicide and the "short form" instruction that was read was sufficient under Rojas, infra, to give the jury a complete definition of manslaughter.

Officer Sauro was not the "proximate cause" of the fatal crash. Petitioner cannot be heard to argue that he had some kind of right to flee from the police and, therefore, it was not his fault the collision occurred. Petitioner is not allowed to rely on the alleged negligence of the pursuing officer inasmuch as Officer Sauro had no obligation to let Petitioner escape.

A departure of more than one cell was proper because the other reasons for departure, including the only remaining valid reason, was based upon offenses and acts separate from the violation of probation. A great risk of harm to others is not an inherent component of manslaughter. That Petitioner was acquitted of second degree murder does not mean that the trial court somehow impermissibly used that acquittal in order to find a valid reason for departure.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT IMPR PERL FAILED TO GIVE COMPLETE INSTRUCTIONS ON MANSLAUGHTER AND ON THE THEORY OF THE DEFENSE THAT THE CRIME WAS AN ACCIDENT. (As stated by Petitioner).

Petitioner has argued that the trial court should have given the "long form" excusable homicide instruction because Rojas v. State, 552 So.2d 914 (Fla. 1989) mandates the same. He is wrong.

In Rojas, the issue was whether the complete absence of a justifiable and excusable homicide instruction was error where an instruction on manslaughter was given. Citing to such decisions as Hedges v. State, 172 So.2d 824 (Fla. 1965) and Lomax v. state, 345 So.2d 719 (Fla. 1977), this Court said that a complete definition of manslaughter requires an explanation of what it is not, that being either justifiable or excusable homicide. Furthermore, failure to give a complete instruction on a lesser included offense, such as manslaughter as it relates to second degree murder, constitutes "prejudicial error". Accordingly, this Court ultimately held that the 1985 jury instruction on manslaughter adequately informed the jury concerning excusable or justifiable homicide when it called upon a judge to merely refer back to those instructions as previously given.

Herein, the issue is not the complete absence of a instruction for excusable or justifiable homicide when the manslaughter instruction was given. Rather, Petitioner has argued that the trial court should have given the "long form"

excusable or justifiable homicide instruction along with the manslaughter definition. Rojas does not indicate that failure to give the "long form" instructions is error, only that failure to give any such instruction is error. Rojas does not reach the issue of whether a trial court must give the "long from" instruction for the sake of a complete definition of manslaughter. Nor does Rojas address whether failure to give the "long form" excusable or justifiable instruction is error (where the "short form" is given) when there is no evidence to support a claim of excusable or justifiable homicide. Accordingly, Petitioner cannot rely on Rojas to support his claim that the long form excusable or justifiable homicide instruction should have been given along with the manslaughter instruction.

The district court found that any error for failing to give the long form instruction was harmless, simply because there was no evidence to support a claim of excusable or justifiable homicide. This Court specifically decided not to pass upon the issue of whether it was error to forego giving the long form excusable or justifiable instruction when there is no evidence to support the same. Rojas, at footnote 3. This Court is urged not to undertake a wholesale review of the same evidence as already heard by a jury and reviewed by the district court. Both found there to be no evidence of excusable or justifiable homicide. Accordingly, given the lack of such evidence, it was not error for the trial court to have given the short form instruction and, that by giving the short version, the trial court complied with the dictates of Rojas.

ISSUE II

WHETHER THE COURT IMPROPERLY FAILED TO INSTRUCT THE JURY ON MILLER'S DEFENSE THAT THE ACCIDENT WAS IN FACT AN ACCIDENT PROXIMATELY CAUSED BY THE PURSUING OFFICER. (As stated by Petitioner).

Though the people of the State of Florida well recognize the right a criminal defendant to have an instruction given bearing upon his theory of defense, it is indeed shocking and sad that Respondent must endure the advancement of Petitioner's defense under such a tragic set of facts.

Petitioner has advanced the chilling argument that the fatal crash was simply not his fault because he had the right to flee from the law and that had Officer Sauro not violated this right by giving chase, the accident never would have happened. He cloaks this argument under the legal phrase of "proximate cause" inasmuch as "but for" Sauro's pursuit, the crash would not have happened. Such brazen reasoning should lead to the conclusion that Petitioner was not at fault for the crash and that the officer should have been properly blamed for the fatalities. No decisional law in this state supports a jury instruction leading to such a horrific conclusion.

In J.A.C. v. State, 374 So.2d 606 (Fla. 3d DCA 1979), a case relied upon by Petitioner, the only cause of the accident was the fact that the defendant's passenger affirmatively grabbed onto the steering wheel, instead of the stick shift, during a drag race. In other words, J.A.C. was simply not at fault in the

accident. Herein, Petitioner can make no such claim of faultlessness. No convoluted leap of legal logic could possibly conclude that Petitioner had some kind of right to flee from Officer Sauro. He cannot claim, by the facts presented at trial, that he was totally without fault and that the only cause of the fatal crash was Officer Sauro. Accordingly, under J.A.C., Petitioner was not entitled to a jury instruction on proximate cause. See also State v. Rushing, 532 So.2d 1338 (Fla. 4th DCA 1988).

In yet another case relied upon by Petitioner, Scarborough v. State, 188 So.2d 877 (Fla. 3rd DCA 1966), the defendant was travelling over the center line of a narrow secondary road, in the dark, when he struck another vehicle. How, on earth, Petitioner can compare his conduct to that of the conduct in Scarborough is far beyond reason! His driving behavior was more closely akin to that of a freewheeling scofflaw leading the police on a wild rampage down the interstate in a Burt Reynolds movie. Petitioner willingly drove his car at high speed into oncoming traffick (however "light") in broad daylight while attempting to elude the police. The conscience of the people of this State is shocked at the mere suggestion that "[T]hese circumstances provided a basis for a jury decision that the accident was in fact an accident and that officer Sauro's decision to pursue closely without his emergency warning devices on was the proximate cause of the accident". Apparently, Petitioner has turned a blind eye to the plain truth that had he

not run from the law, as he had no right to do, the "accident" would not have happened. This Honorable Court is urged not to indulge Petitioner's fantastic argument in favor of a proximate cause jury instruction.

The instructions given by the court, at the states request, were not in error. Most all of the other cases concerning proximate cause and the standard of care owed by a pursuing officer to a crash victim arise out of civil suits, rather than criminal prosecutions. Though Appellee does not wish to urge upon this Court that civil tort law should be universally applied to criminal law, such civil cases suggest that a different standard of care applies to police officers and that pursuing officers are. . .

> . . . not responsible for the acts of the pursued offender, although the pursuit may have contributed to the reckless driving of the pursued offender, since the officer is not obliged to allow him to escape.

Reed v. City of Winter Park, 253 So.2d 475 (Fla. 1st DCA 1989). See also City of Miami v. Horne, 198 So.2d 10, 13 (Fla. 1967). Officer Sauro was not obliged to let Appellant escape. That Officer Sauro acted in a wanton manner was not established by the evidence. There may have been a better course of action for him to have taken, but, that he acted in a totally careless or wanton manner is unsupported by the record. That he stayed far behind Appellant (only one witness said he pursued Appellant within six inches of his vehicle) is evidence that he indeed took care

within the rational bounds of the obligation not to let Appellant escape.

Aside from the strictly civil tort liability cases, other criminal case such as Filmore v. State, 336 So.2d 586 (Fla. 1976) indicate that the conduct of a decedent, or, arguendo, Officer Sauro, can only be controlling if such conduct was the sole proximate cause of the accident. Thus, under J.A.C., Rushing, and Filmore, because Appellant was unable to show that Officer Sauro was the sole cause of the collision, Appellant was not entitled to an instruction defining the standard of conduct for a pursuing police officer.

ISSUE III

WHETHER THE GUIDELINES DEPARTURE REASONS OF GREAT DANGER TO OTHERS WAS INVALID, BECAUSE (1) MILLER'S PROBATION WAS REVOKED, (2) EXTREME DANGER TO OTHERS WAS INHERENT IN THE CRIME OF MANSLAUGHTER, (3) HE WAS NOT CHARGED WITH CULPABLE NEGLIGENCE FOR CAUSING DANGER TO OTHERS, AND (4) HE WAS ACQUITTED OF SECOND DEGREE MURDER. (As stated by Petitioner).

For his last issue, Petitioner argues that knowingly creating a great risk of injury or death to a large number of persons is an invalid reason for departure. He first posits that Ree v. State, 14 F.L.W. 565 (Fla. 1989) gives the controlling rule that a court may not depart more than one cell for a probation violation. Inasmuch as this Court has withheld Ree from official publication, Petitioner's reliance on it is misplaced. Even so, in Ree, all the reasons for departure were based upon his violation of probation; none of the reasons were connected to the facts of any new charges for which Ree was convicted. Accordingly, Ree is indeed correct in its reaffirmation of the rule that only a one cell departure is permitted for a violation of probation. However, sub judice, the other reasons for the court's departure, including the one in dispute herein, were based upon the facts surrounding the new substantive crimes. Ree simply does not say that a sentencing court cannot depart for reasons quite apart from the probation violation, for offenses separate from the violation, and upon which a defendant is before the court for sentencing. Therefore, the trial court's departure for reasons relating solely to the

new substantive convictions does not violate the rule permitting no more than a one cell "bump up" for a probation violation.

Next, Petitioner seems to have great difficulty following the distinction drawn by the district court between the instant case and Mayo v. State, 518 So.2d 458 (Fla. 1st DCA 1988). Once again, he takes a utopian view of the evidence at trial. The district court concluded, after examining the evidence, that Petitioner's conduct endangered "numerous motorists, some of whom were forced off the road". Miller v. State, 549 So.2d 1106, 1109 (Fla. 2d DCA 1989). That Petitioner was acquitted of second degree murder does not mean that his act of manslaughter did not endanger the lives and safety of persons other than his ultimate victims. Moreover, Petitioner's reliance on the standard jury instruction for culpable negligence is misplaced because the statute makes culpable negligence criminal when the actors conduct inflicts personal injury on a specific victim. Section 784.05(2), Florida Statutes. Accordingly, that Petitioner's conduct endangered persons other than his ultimate victims does not run afoul of the rule barring departure for reasons that are an inherent component of the crime. Thus, the district court below correctly reasoned that Mayo was inapplicable because, unlike the situation in Mayo, Petitioner's conduct endangered persons other than his ultimate victims.

Petitioner's next argument, that his departure sentence cannot be based upon uncharged crimes (apparently one crime of culpable negligence against each motorist he flew by on the way

to killing the final two motorists) is without merit. Petitioner makes the blanket assertion that a departure sentence cannot be based on factors relating to offenses for which a defendant is not charged. However, the rule announced in Felts v. State, 537 So.2d 955 (Fla. 1st DCA 1988) is that a departure cannot be upheld when it involves circumstances for which a conviction was not obtained. If one follows Petitioner's sound reasoning to its illogical conclusion, it would mean that if any conceivable crime could be charged as a result of danger posed to people other than the immediate victims, then a departure based upon a great risk of injury or death to a large number of persons may never constitute a valid reason for departure.

In McIntyre v. State, 539 So.2d 603 (Fla. 3rd DCA 1989), the district court did state, in a footnote, that the uncharged crimes of reckless driving in a fleeing situation could not be used to depart. However, as authority for such a rule, they cited to Banzo v. State, 464 So.2d 620 (Fla. 2d DCA 1985). In Banzo, the state may very well have been able to obtain a conviction for a higher drug offense than what was actually charge. Accordingly, failure to obtain such a conviction where the state, quite arguably could, if not should have done so, was found not to be a valid reason for departure. Sub judice, Petitioner argues that because culpable negligence should or could have been charged, it was improper to depart. However, Petitioner fails to note that culpable negligence may not have been chargeable against "others" because, based upon double

jeopardy principles, the same acts that would have supported such a conviction were subsumed in the crime for which he was ultimately convicted. Thus, unlike, the situation in Banzo and McIntyre,[1] where the reasons for departure constituted crimes that should have been charged, it would have simply been improper herein to obtain an additional conviction for culpable negligence against unknown others.

Finally, Petitioner finds error in the district court's reasoning that a flagrant disregard for the safety of others is invalid as a reason for departure because he was acquitted of second degree murder. He makes the bald assumption that merely because the jury acquitted him of second degree murder, it definitely means that his conduct was not flagrant enough to constitute a valid reason for departure. Yet, Petitioner can only guess as to why the jury granted such an acquittal. Accordingly, based upon such speculation, Petitioner cannot say that the trial court improperly considered the higher crime -- for which there was not conviction -- as a significant element in the decision to depart.

It is interesting to note that in his Brief on Jurisdiction, Petitioner urged this Court to find conflict between the instant case and Pendelton v. State, 493 So.2d 1111 (Fla. 1st DCA 1986), but has chosen herein not to advance an argument based thereon.

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[1] The state failed to charge the defendant with the additional and separate crime of reckless driving while fleeing from the scene of a single criminal episode in which he committed burglary and auto theft).

Petitioner asserted that the trial court erroneously opined that he should have been found guilty of second degree murder and, based upon this belief, used it as a reason for departure. Obviously, Petitioner has abandoned such an argument because neither the district court or the trial court ever announced such a belief. The same reasoning holds true for Petitioner's reliance on Vanover v. State, 498 So.2d 899 (Fla. 1989). In Vanover, this Court invalidated a departure because the trial court considered the unfounded higher crime in its decision to depart. Below, the Second District never expressed any such view. Neither did the trial court. Though Petitioner boldly asserts, because he was acquitted of second degree murder, that his conduct could not possibly rise to the level sufficient to support a departing for creating a serious risk to others, he fails to see that the district court never, as in Vanover or Pendelton, employed a disbelief in the wisdom of the jury's verdict to support the departure.

Petitioner's bootstraping argument that an application of valid departure reasons for second degree murder is tantamount to employing an acquittal for second degree murder as a valid reason to depart for a manslaughter conviction is without any supporting language that can be found in Miller. Accordingly, absent the sort of erroneous reasoning as found in Vanover and Pendelton, flagrant disregard for the safety of others is, in this case, a valid reason for departure.

CONCLUSION

WHEREFORE, the decision of the district court should be affirmed.

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 STEPHEN KROSSCHELL, Assistant Public Defender, Public Defender's Office, Polk County Courthouse, P.O. Box 9000--Drawer PD, Bartow, Florida 33830, this 25th day of April, 1990.

OF COUNSEL FOR RESPONDENT