IN THE SUPREME COURT OF FLORIDA

CARL A. HAAS,

Petitioner,

vs. Case No. 76,767

STATE OF FLORIDA,

Respondent.

RESPONDENT'S BRIEF ON THE MERITS

On Discretionary Review From the
District Court of Appeal,
Fifth District of Florida

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PRELIMINARY STATEMENT

Petitioner, Carl Andrew Haas, was the defendant in the trial court and Appellant in the District Court. Mr. Haas will be referred to as "Petitioner." Respondent, the State of Florida, was the prosecution in the trial court and the Appellee in the District Court. The State will be referred to as "Respondent."

References to the record on appeal will be by use of the symbol "R" followed by the appropriate page numbers in parentheses.

STATEMENT OF THE FACTS

The pertinent facts are outlined by the District Court of Appeal in its *en banc* decision as follows:

At about 10:00 o'clock on the evening of March 12, 1988, Petitioner was driving a pickup truck on Highway 50 in Orange County, Florida. Although the highway at that point was a divided, four-lane highway, Petitioner was driving west in the left, eastbound lane. He was familiar with the area. He drove on the wrong side of the divided highway for approximately two miles, passing six median crossovers. At least one car approaching him swerved to get out of his way. Another driver blew his horn to get Petitioner's attention. Without any effort to avoid the impending collision, Petitioner ran head-on into a vehicle driven by Jennifer Trotter, killing her and injuring her four-year-old son, Kevin. At the scene of the accident, Petitioner smelled of alcohol and three cans of cold beer with one open car were found in a six pack inside the truck; two empty cans were found outside the truck. Petitioner was combative at the scene. His blood alcohol level measures 0.11% when his blood test was administered an hour and twenty minutes after the accident.

Haas v. State, 15 F.L.W. D2418 (Fla. 5th DCA, Sept. 27, 1990).

SUMMARY OF THE ARGUMENT

The Fifth District Court of Appeal affirmed the Petitioner's conviction and sentence for DUI manslaughter and driving under the influence of alcohol causing serious bodily injury based, in part, on jury findings that the Petitioner's blood alcohol level (BAL) was at least 0.10% at the time of the traffic collision caused by the Petitioner on Highway 50 in Orange County, Florida. Petitioner had challenged the trial court's failure to grant his motion for judgment of acquittal contending there was no direct evidence to establish that his BAL, at the time of the accident, met the minimum requirement of 0.10%. Rejecting the argument that direct evidence was required in order to sustain these convictions, the *en banc* Fifth District affirmed.

Although the Fifth District certified as a question of great public importance the same question presented by the Third District Court of Appeal in State v.Miller, 555 So.2d 391 (Fla. 3d DCA 1989),[1] the Petitioner has ignored the question and attempted to relitigate his direct appeal issue. Therefore, Respondent contends that Petitioner has forfeited his right to seek review of the certified question. Accordingly, Respondent urges this Court to dismiss the appeal.

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[1] Miller v. State, Case No. 75,708, orally argued Dec. 3, 1990.

As for the certified question, Respondent reasserts the position urged by the Attorney General in the Miller case, supra.

Lastly, should the Court burden itself with reargument of a direct appeal issue, Respondent would rely upon the scholarly analysis of Judge Harris in the decision below. Pursuant to State v. Law, 555 So.2d 187 (Fla. 1989), the Respondent presented competent evidence, indeed overwhelming evidence, to establish to the satisfaction of a reasonable jury that the Petitioner's BAL was above the lawful limit at the time of his automobile collision. Therefore, the District Court's decision should be upheld.

ARGUMENT

ISSUE I

WHETHER THE NUMERICAL RESULT OF THE DEFENDANT'S BLOOD ALCOHOL TEST TAKEN ONE AND ONE-HALF HOURS (1½) AFTER THE DEFENDANT'S LAST OPERATION OF A MOTOR VEHICLE IS ADMISSIBLE IN EVIDENCE WHERE THE STATE'S EXPERT WITNESS WOULD TESTIFY THAT THE DEFENDANT'S BLOOD ALCOHOL LEVEL AT THE TIME HE WAS OPERATING THE MOTOR VEHICLE, WHERE THE STATE'S EXPERT WITNESS WAS UNABLE TO TESTIFY WHAT THE DEFENDANT'S BLOOD ALCOHOL LEVEL WOULD BE AT THE TIME HE WAS OPERATING THE MOTOR VEHICLE AND HAS TESTIFIED THAT THE DEFENDANT'S BLOOD ALCOHOL LEVEL COULD HAVE BEEN LOWER THAN .10% AT THE TIME THE DEFENDANT OPERATED THE MOTOR VEHICLE.

A. THIS CASE SHOULD BE DISMISSED.

At the outset, Respondent renews its previously denied motion to dismiss this appeal. The Petitioner has ignored the certified question and sought to relitigate a direct appeal issue which was appropriately handled in the court of final direct appellate jurisdiction in criminal cases. It is constitutionally inappropriate and a waste of the resources of this Court to allow Petitioner "two bites of the apple." White v. Dugger, 565 So.2d 700 (Fla. 1990). Petitioner could have combined his current argument with a discussion of the certified question, but he has chosen to ignore the latter. This Court should accept that concession and dismiss this case for lack of jurisdiction.

B. THE MILLER QUESTION

Respondent urges this Court to adhere to the majority view of the states who have considered this question and adopt the analysis of Judge Harris as outlined in the *en banc* decision of the Fifth District Court of Appeal.

The concise question in this case is whether a breath test result is admissible against a defendant charged with driving under the influence of alcohol pursuant to § 316.193, Fla. Stat. (1987), where the breath test was taken after the defendant was driving and where the State cannot scientifically pinpoint exactly what the defendant's blood alcohol level was at the time he was driving. The Petitioner's position would compel the State to present evidence of an accused's blood alcohol level at the time he was physically driving through the process of retrograde extrapolation before the breath test results would be admissible. The District Court correctly rejected this conclusion since the breath test results are admissible for the jury to weigh and consider as they, the finders of fact, determine. In this regard, the court joined the holding of the Third District Court of Appeal in State v. Miller, 555 So.2d 391 (Fla. 3d DCA 1989).

Adopting and reiterating our position in that pending case, the Respondent contends:

I. Suppression of the BAL evidence would contravene legislative intent.

Section 316.1934(2) provides:

> (2) Upon the trial of any civil or criminal action or proceeding arising out of acts alleged to have been committed by any person while driving, or in actual physical control of, a vehicle while under the influence of alcoholic beverages or controlled substances, when affected to the extent that his normal faculties were impaired or to the extent that he was deprived of full possession of his normal faculties, the results of any test administered in accordance with s. 316.1931 or s. 316.1933 and this section shall be admissible into evidence when otherwise admissible, and the amount of alcohol in the person's blood at the time alleged, as shown by chemical analysis of the person's blood or breath, shall give rise to the following presumptions:
>
> (Emphasis added).

Through its clear and unambiguous terms, the statute says that the results of tests administered in accordance with § 316.1932 or § 316.1933 shall be admissible when otherwise admissible. Sections 316.1932 and 316.1933 outline procedures for administering breath, blood and urine tests. Only noncompliance with statutory and regulatory requirements, i.e. HRS rules, which would render test results otherwise inadmissible. State v. Bender, 382 So.2d 697 (Fla. 1980); Gillman v. State, 373 So.2d 935 (Fla. 2d DCA 1979), *aff'd*, 390 So.2d 62 (Fla. 1980). In the

instant case, the testing procedure is not at issue. Therefore, the test results are admissible. Accord, §§ 90.401 and 90.402, Fla. Stat. (1987).

II. Extrapolation evidence is not required for a conviction under §316.193(1), Fla. Stat. (1987).

The defendant was charged under §316.193, Fla. Stat. (1987), which provides in pertinent part:

> **316.193 Driving under the influence; penalties.-**
>
> (1) A person is guilty of the offense of driving under the influence and is subject to punishment as provided in subsection (2) if such person is driving or in actual physical control of a vehicle within this state and:
>
> (a) The person is under the influence of alcoholic beverages, any chemical substance set forth in s. 877.111, or any substance controlled under chapter 893, when affected to the extent that his normal faculties are impaired; or
>
> (b) The person has a blood alcohol level of 0.10 percent or higher.
>
> (Emphasis added).

This section, by its use of a disjunctive connective term ("or"), describes one offense of driving under the influence which can be committed by either or both of two methods; driving or being in

actual physical possession of a vehicle while under the influence of either alcohol or chemical substances to the extent that normal faculties are impaired or by driving with a blood alcohol level of 0.10% or above. Layman v. State, 455 So.2d 607 (Fla. 5th DCA), *rev. denied*, 459 So.2d 1040 (1984).

The reason Florida's "Drunk Driving" statute outlines two methods of proof is because it has been demonstrated empirically that a motorist's ability to drive safely is adversely affected by a blood-alcohol content of 0.10% even though some individuals, for example hard-core alcoholics, may not exhibit symptoms of intoxication at that level. See, State v. Knoll, 718 P.2d 589 (Idaho App. 1986). Therefore, by statute, the state is not required to prove that an accused's blood alcohol level is greater than 0.10% in order to convict one of driving under the influence of alcohol. Moreover, there is no statutory authority, administrative rule, or case law in Florida which requires the breath test results obtained some time after a defendant's arrest to be related back to the time that the defendant was actually driving.

Though the literal wording of §316.193(1) may suggest that it must be proven that a defendant had a blood alcohol level greater than 0.10% when he was driving or in actual physical control of his vehicle, this Court must give effect to the legis-

lative intent. Vildibill v. Johnson, 492 So.2d 1047 (Fla. 1986); Lowry v. Parole and Probation Commission, 473 So.2d 1248 (Fla. 1985). "Where the wording of a statute taken literally conflicts with the plain legislative intent, the wording must yield to the legislative purpose." State v. Greco, 479 So.2d 786 (Fla. 2d DCA 1985).

In enacting § 316.193(1)(b), the portion of the crime at issue in this case, the legislature clearly intended to rely upon breath or blood test results taken at a time subsequent to driving. See §316.1934, Fla. Stat. (1987). It would be absurd to suggest that a breath or blood test could be administered while a defendant was still driving. Under the interpretation, a breath testing device must be shoved into an accused's mouth the moment he is stopped for driving under the influence. Instead, it is apparent that the Florida Legislature intended testing to be done when the DUI statutes are read in conjunction with the administrative rules enacted pursuant to them. For example, Rule 10D-42.24(1)(f), Florida Administrative Code, requires a minimum observation period of twenty minutes before a breath test can be administered and before some equipment, such as an indium crimper device, warms up. Had the legislature intended an additional foundation for this evidence, it would have so stated. After all, statutes are not passed in a vacuum, and absurd or unreasonable results are presumed not to have been intended.

Extrapolation is the process whereby a qualified expert, usually a toxicologist, may render an opinion as to a person's blood alcohol content at the time the defendant was driving when the blood alcohol test was conducted some time after the stop. An accurate extrapolation can be affected by numerous variables. In order to make a reliable calculation, an expert would need to know the time of consumption, how much consumed, and the time of the last drink, among other variables. As cases from other jurisdictions have noted, while blood alcohol content declines over time, the decline does not begin until sometime after the last drink which been estimated anywhere from 45 minutes to 90 minutes. Fuenning v. Superior Court, 139 Ariz. 590, 680 P.2d 121 (1983); State v. Sutliff, 97 Idaho 523, 547 P.2d 1128 (1976); People v. Kappas, 120 Ill.App.3d 123, 458 N.E.2d 140 (1983); McCormick, Evidence §205, at 615 [3d Ed.]; Fitzgerald & Hume, Simple Chemical Test for Intoxication: A Challenge to Admissibility, 66 Mass.L.Rev. 23 (1981).

In Miller v. State, supra, the Third District, realizing that this was an issue of first impression in Florida, looked to other jurisdictions that have considered this issue to determine whether extrapolation is required by the statute. The Supreme Court of New Jersey addressed a similar issue in State v. Tischio, 107 N.J. 504, 527 A.2d 388 (1987). The Tischio court was called upon to determine whether a blood alcohol level of at

least 0.10% determined solely by a breathalyzer test, that is administered within a "reasonable time" after a defendant's arrest for drunk driving, satisfied their statute N.J.S.A. §39:4-50(a), or whether extrapolation evidence was required to establish the statutory offense.[2] The defendant in Tischio was tested one hour after he was arrested for DUI and again nine minutes later. Both breath tests results yielded a blood alcohol level of 0.11%. As the Tischio court succinctly stated:

> Although the statute [N.J.S.A. §39:4-50(a)] does not refer to the time of testing, it is obvious that a breathalyzer test cannot be administered while a defendant is driving his motor vehicle. Thus, the blood alcohol level determined by a breathalyzer test can never automatically coincide with the time of the defendant's actual operation of his motor vehicle, as suggested by the literal language of the statute. This raises at least two possible interpretations of the statutory offense. One is that a .10% blood-alcohol level determined by a breathalyzer test made within a reasonable time of defendant's operation alone satisfied the statute. The other is that some evidentiary process -- not discernible on the face of the statute -- must be invoked to

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[2] N.J.S.A. §39:4-50(a) provides in pertinent part:

> A person who operates a motor vehicle while under the influence of intoxicating liquor . . . or operates a motor vehicle with a blood alcohol concentration of 0.10% or more by weight of alcohol in the defendant's blood . . . shall be subject [to penalties].

> relate breathalyzer test results to the time when the defendant was actually driving. The question is which interpretation comports with the true meaning of the statute.
>
> 427. A.2d at 391. (Footnote omitted).

The Supreme Court of New Jersey then proceeded to analyze the legislative intent behind the statute. Like New Jersey, and every other state, the primary purpose behind Florida's drunk driving statutes, §316.193, §316.1932, §316.1933, and §316.1934, which contain portions that direct law enforcement to use only approved scientific techniques in testing for alcohol, is to address the problem of drunk drivers on public roadways who cause senseless havoc and destruction. State v. Bender, supra, 382 So.2d at 699.[3] Tischio, supra, 517 A.2d at 392. An examination of the overall scheme of the New Jersey and Florida drunk driving laws reflect the legislative intent to rely exclusively on breath test results whenever possible. Tischio, supra, at 394; See, State v. Hoch, 500 So.2d 597 (Fla. 3d DCA 1986).

The point of such legislation is to stop drivers from drinking a quantity of alcohol that could, at any time they are behind the wheel, give them a blood alcohol level of .10% or higher. Otherwise, people could drink a large quantity of

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[3] Bender specifically applies to former §§ 322.261 and 322.262 which have since been repealed and renumbered as §§ 316.1932 and 316.1934, respectively.

alcohol, get in their cars, and become "moving time bombs." Tischio, at 396. "The law was not intended to encourage a perilous race to reach one's destination, whether it be home or the next bar, before the alcohol concentration reaches the prohibited level." Id. Such an interpretation would surely lead to absurd and dangerous results.

In concluding that a defendant may be convicted under N.J.S.A. §39:4-50(a) when a breath test, administered within a "reasonable time" after the defendant was actually driving, reveals a blood alcohol level of at least 0.10%, the Supreme Court of New Jersey held that extrapolation evidence was not probative of the statutory offense. The state submits that as Florida's drunk driving law is similar to New Jersey's, this Court should follow Tischio and hold that extrapolation evidence is not necessary for a conviction under §316.193, Fla. Stat. (1987).

Many jurisdictions have made it a criminal offense to drive or operate a motor vehicle when that person's blood alcohol level reaches or exceeds a certain legislatively determined level. Some of these jurisdictions have made driving with a proscribed blood alcohol level a separate and distinct offense from driving under the influence while others, like Florida, have made their driving under the influence statutes provable in two ways. Either way the state does not have any jurisdiction, with the

exception of Vermont, that required extrapolation or relation back testimony for admission of breath test results taken after the accused was driving. See, e.g. Simon v. State, 182 Ga.App. 210, 355 S.E.2d 120 (1987)(extrapolation not required when test administered 40 minutes after arrest); State v. Knoll, 110 Idaho 678, 718 P.2d 589 (Idaho App. 19856)(extrapolation not required; 47 minutes delay); Commonwealth v. Speights, 353 Pa. Super. 258, 509 A.2d 1263 (1986)(extrapolatoin not required; 2 hours and 45 minutes delay in testing was jury question); Commonwealth v. Slingerland, 358 Pa. Super. 531, 518 A.2d 266 (1986) (extrapolation not required; one and one-half hour delay); People v. Kappas, 120 Ill.App.3d 123, 458 N.E.2d 140 (Ct. App. 1983) (extrapolation not required; 38 minutes delay is question for jury going to weight of the breathalyzer results and nor admissibility); State v. Keller, 36 Wash.App. 110, 672 P.2d 412 (Ct. App. 1983)(extrapolation not required; hour delay in testing); But see State v. Rollins, 141 Vt. 105, 444 A.2d 884 (1982); State v. Dumont, 146 Vt. 252, 499 A.2d 787 (1985).

Some states have enacted statutes providing legislatively designated time periods such as two, three or four hours within which conducted tests are accorded per se effect. See, e.g., Jackson v. Municipality of Anchorage, 662 P.2d 963 (Alaska App. 1983)(extrapolation not required where 30 minutes delay within four hour statutory limit); Minn. Stat. Ann. §169.121 Subd. 2

(Supp. 1983); State v. Ulrich 17 Ohio App. 3d 182, 478 N.E.2d 812 (Ct. App. 1984)(extrapolation not required absent clear statutory language requiring need for expert testimony as 37 minute test delay within the two hour statutory limit). Other jurisdictions, such as North Carolina, have left the question of timeliness to the trier of fact. See, State v. Mack, 81 N.C. App. 578, 345 S.E.2d 223 (1986)(extrapolation not required where one hour delay is within a "reasonable time" after driving). Though Florida does not yet have a statutorily permissible time limit, the State urges this Court to follow the overwhelming majority of jurisdictions that do not require extrapolation evidence to admit blood alcohol test results which are taken within a reasonable time after an accused is actually driving.

3. The delay in testing goes to the weight of the evidence and not its admissibility.

As noted above, any evidence relevant to prove a fact in issue is admissible unless its admissibility is precluded by some specific rule of evidence. Breath test results are admissible in a prosecution charging driving under the influence of alcohol in that it would tend to prove the ultimate issue of impairment. Sections 90.401 and 90.402, Fla. Stat. (1987); Sections 316.1932, 316.1933, and 316.1934, Fla. Stat. (1987).

Certainly, if refusal to submit to a breath test is admissible pursuant to § 316.19323(1)(b), (2)(c), Fla. Stat. (1987), in a prosecution for driving under the influence, then the result of a breath test, provided it was taken pursuant to rules and regulations governing the administration of such a test, should be admissible as relevant evidence. State v. Bender, supra; Gillman v. State, supra. Any presumptions raised are rebuttable and the defendant may attack the reliability of the testing procedures and argue it to the jury. Bender, supra; See State v. Rolle, 15 F.L.W. S102 (Fla., March 1 1990). These principles are no less applicable to a case where an accused's breath test was administered some time after his actual driving. The lapse of time between the operation of the motor vehicle and the administration of the breath test would not bar the admission of the breath test result; rather, it should simply affect the weight ascribed to the evidence by the finder of fact.

The Arizona Supreme Court put this issue in a nutshell when it announced, in Fuenning v. Superior Court of the State of Arizona, 139 Ariz. 590, 680 P.2d 121 (1983):

> The essence of this argument is the difficulty of proof that the defendant had the prescribed BAC at the time he drove or controlled the motor vehicle when the chemical test is administered some time after and is subject to the unavoidable problems discussed above. . . . Obviously, since it is the person's BAC at the time of

> driving or controlling the vehicle which determines whether the statute has been violated, results of a test administered after a significant period of time has elapsed or which are subject to other factors creating scientific inaccuracy may lave a reasonable doubt of guilt. These are evidentiary problems which are for the fact finder.
>
> The defendant may offer expert testimony to show that for one reason or another the test results of a 10% or higher do not prove beyond a reasonable doubt that the level at the time of driving was in excess of that proscribed. At the same time, the State may introduce evidence to explain the methodology and corroborate or establish the accuracy of the particular test as an indication of alcohol level at the critical time. The question of whether the results establish that the prosecution has met its burden of proving the defendant guilty beyond a reasonable doubt is for the jury
> . . . .

For all of the above stated reasons, the least of which is that common sense would dictate that a blood alcohol test could not always be administered immediately, the delay in testing in the instant case was not unreasonable. Nothing is precluding a defendant from arguing to the jury that his test result was inconclusive, thus, affecting the weight of the evidence. The trial court erred in suppressing the breath test results in the instant case. This Court is therefore urged to agree with both the Third District and Fifth District and answer the certified question in the affirmative.

C. THE SUFFICIENCY OF THE EVIDENCE

Finally, assuming, *arguendo*, the Court overlooks Petitioner's failure to address the certified question, the record below clearly supports the District Court's determination that the trial court did not err in denying Petitioner's motion for judgment of acquittal.

In his direct appeal, Petitioner conceded that his blood alcohol level (BAL) test result was relevant and admissible at his trial, even though there was no extrapolation testimony to show his BAL at the time of driving. (Appellant's Brief, p. 9 attached as Appendix to this brief). Therefore, the only preserved issue is whether the trial court properly denied Appellant's motion for judgment of acquittal.

Petitioner contends that the trial court should have granted the judgment of acquittal because the evidence was purely circumstantial and it did not eliminate all reasonable hypotheses of innocence. However, the correct test in analyzing motions for judgment of acquittal based on circumstantial evidence is whether the jury could reasonably conclude that the evidence excluded every reasonable hypothesis except that of guilt. Lynch v. State, 293 So.2d 44, 45 (Fla. 1974). It is not whether in the trial court's or appellate court's opinion the evidence fails to exclude every hypothesis of innocence, but whether the jury must so conclude. Law v. State, supra.

When applying the circumstantial evidence standard to a motion for judgment of acquittal, the trial judge does not have to assume that the jury will believe the defense version of the facts. Cochran v. State, 547 So.2d 928 (Fla. 1989). Additionally, by making a motion for judgment of acquittal, a defendant admits all facts introduced into evidence and the court must view the facts in the light most favorable to the State. Lynch, supra. The question of whether the evidence fails to exclude all reasonable hypotheses of innocence is for the jury to determine, and appellate courts will not reverse where there is substantial, competent evidence to support the verdict. State v. Law, supra; Heiney v. State, 447 So.2d 211 (Fla. 1984), *cert. denied*, 469 U.S. 920 (1984).

As determined by the District Court below, there was substantial, competent evidence (direct and circumstantial) to convict Petitioner. Four witnesses testified that they smelled the strong odor of alcohol coming from Appellant's face. (R 177, 199, 210, 222). Two witnesses saw beer cans in Appellant's truck. (R 177-178, 210-211). One of those witnesses testified that there were four cans of cold beer inside the truck -- three were still in the six-pack container and one was open. (R 177-178). Two witnesses said that Appellant was combative and that he tried to hit the paramedic who was helping him. (R 180, 330-331).

Appellant's driving pattern was also competent evidence for the jury to consider. He was driving westbound in the eastbound lane of a divided highway. (R 255). While that fact, in and of itself is not necessarily incriminating, there was other testimony which the jury could consider in conjunction with that fact. For instance, as Appellant drove the wrong way for two miles, all of the road signs were reversed. So he would not have been able to read any signs but would be seeing only the backs of the signs. (R 268). Therefore, he should have realized he was driving the wrong way.

There was also a solid yellow line on the road which always appears to the left of the driver. (R 268). But Appellant never realized that the line was on the wrong side. Oncoming traffic flashed their bright lights at Appellant and honked their horns. (R 126, 268). At least one car swerved out of Appellant's way at the last minute. (R 161). Additionally, there were six breaks in the median which divided the highway. (R 272). Appellant should have noticed, after passing several breaks in the median on his right, that he was going the wrong way on a divided highway. Two witnesses testified that Appellant never tried to take any evasive action or even hit his brakes when he hit the victim head-on. (R 165, 256-257).

Appellant's hypothesis of innocence, the defense which he argued throughout his trial, was that he made an innocent mistake when he pulled out the wrong way on the road. He argued to the jury that he simply thought he was on a two lane road. (R 380). However, the jury heard much evidence about the two-mile stretch of road that Appellant claimed to be mistaken about. In addition to the facts regarding the signs, the yellow line, the median breaks and oncoming traffic warnings, the jury heard testimony that Appellant stated that he was familiar with that stretch of the road. (R 262). He knew it was a divided highway.

The jury knew that Appellant had not consumed any alcoholic beverages between the time of the crash and when the blood was drawn 90 minutes later. They also knew that there was a strong odor of alcohol on Appellant and cold beer was in the truck, with at least one can open. Finally, they knew that a man who was supposedly familiar with the road and area has pulled out going the wrong way and continued to drive the wrong way for two miles in spite of the many warning signs. When the jury combined all of that information with the fact that Appellant's BAL was still at least .11 ninety minutes after the crash, there was more than sufficient evidence for them to determine that Appellant's BAL was over .10 at the time he slammed his car head-on into the vehicle of his victims.

At trial, the Petitioner never argued that his BAL was lower than .10 at the time of the driving. He only argued that the test result alone did not prove this BAL was above .10 at the time of driving. He explained his conduct on the fact that he was confused and had made a simple mistake in navigation.

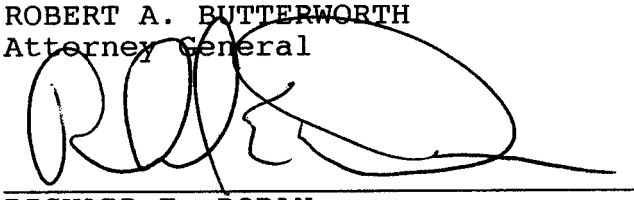
However, the jury concluded otherwise. By finding Appellant guilty, the jury determined that the evidence eliminated his hypothesis of innocence. That was the jury's decision and there was sufficient, competent evidence to support that decision. The trial court properly denied the motion for judgment of acquittal.

CONCLUSION

Respondent prays this Honorable Court will either dismiss this appeal as improvidently granted or affirm the decision of the Fifth District Court of Appeal and answer the certified question in the affirmative.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General



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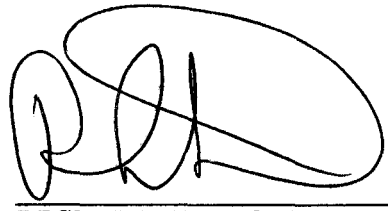
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Mr. Daniel J. Schafer, Assistant Public Defender, Office of the Public Defender, Seventh Judicial Circuit of Florida, 112 Orange Avenue, Suite A, Daytona Beach, Florida 32114, this 4TH day of January, 1991.



RICHARD E. DORAN

IN THE SUPREME COURT OF FLORIDA

CARL A. HAAS,

Petitioner,

vs. Case No.

STATE OF FLORIDA,

Respondent.

APPENDIX TO RESPONDENT'S BRIEF ON THE MERITS

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IN THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT
STATE OF FLORIDA

CARL A. HAAS,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

CASE NO.: 89-1289

APPEAL FROM THE CIRCUIT COURT
IN AND FOR ORANGE COUNTY
STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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OTHER AUTHORITIES CITED

IN THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT
STATE OF FLORIDA

CARL A. HAAS, Appellant,	)	
vs.	)	CASE NO.: 89-1289
STATE OF FLORIDA, Appellee.	)	

INITIAL BRIEF OF APPELLANT

STATEMENT OF THE CASE AND FACTS

Appellant was charged by information with DUI manslaughter, vehicular homicide, and driving under the influence causing serious bodily injury. (R 58-59) The case was initially tried by jury before the Honorable Ted P. Coleman, Circuit Judge. Appellant was found guilty as charged on all counts. (R 513-515) However a motion for new trial was granted. (R 522-529)

On April 17, 1989 the case again proceeded to jury trial before the Honorable Emerson R. Thompson, Jr., Circuit Judge. (R 1) The state's evidence showed that on the evening in question Appellant was involved in an automobile accident on State Road 50 in Orange County. Prior to the accident Appellant was driving at a normal speed and maintaining a single lane, however he was on the wrong side of the median strip. (R 161-162, 169-170, 173) It appears that Appellant had driven nearly two miles and passed six breaks in the median strip since entering State Road 50 on the wrong side before the accident occurred.

Appellant's vehicle collided head on with an automobile driven by Jennifer Trotter. Ms. Trotter was killed and her three year old son was injured. (R 203-205, 306) Examination of the physical evidence showed that Ms. Trotter had applied her brakes less than one second before impact, and that Appellant had not applied his brakes at all. (R 255-257, 266) Although the evidence was inconsistent, some state witnesses reported smelling alcohol on Appellant's breath and seeing beer cans at the accident scene. (R 171, 177, 199-200, 210) Sergeant Sherry Nols of the Florida Highway Patrol investigated the accident and agreed that the circumstances were consistent with the driver in Appellant's position who was not paying attention and did not realize he was on a divided highway and thus on the wrong side of the road. (R 268) Further, because of a curve on the road, both cars involved in the accident may not have realized they would collide until very shortly before impact. (R 270)

Over several objections including relevance, a toxicologist was permitted to testify concerning a blood sample taken from Appellant about one hour and 20 minutes following the accident. (R 174, 281, 283-289) Ms. Christine Alt testified that the sample contained a blood alcohol level of 0.11. (R 239) She testified that the concentration of alcohol in Appellant's blood would not change between the time the sample was taken and the time it was tested. (R 292) However, Ms. Alt specifically said she could not tell from analyzing this sample what Appellant's blood alcohol level would have been at the time of the accident. (R 295) More specifically, Ms. Alt said she could not testify

that Appellant's blood alcohol level was in excess of .10 at the time of the accident. (R 296) A motion to strike Ms. Alt's blood alcohol level testimony was denied. (R 302-303)

At the close of the state's case Appellant moved for judgment of acquittal as to each of the three counts. As to the charge of vehicular homicide, Appellant argued the evidence was insufficient to show his conduct was reckless. Appellant contended that a reasonable construction of the evidence was that he was driving at a lawful speed, maintaining a single lane, and had simply made a negligent error by failing to realize he was on the wrong side of the road. (R 308) The motion was denied. (R 309-311)

As to the remaining to charges of DUI manslaughter and DUI causing serious bodily injury, Appellant moves for a partial judgment of acquittal. Each of these counts was charged in the alternative so that proof that Appellant either, (1) was under the influence of alcohol to the extent that his normal faculties were impaired or (2) had a blood alcohol level of .10 percent or higher at the time of the accident, would prove the charges. (R 458-459) Appellant argued that the state had not met its burden of proving that the blood alcohol level was .10 or greater at the time of the accident. Thus, this portion of the two counts should not go to the jury. Specifically, defense counsel pointed out that the state's expert witness had said she could not tell what Appellant's blood alcohol level was at the time of the accident. (R 311-314) Appellant's motion was denied. (R 316-318)

During closing arguments the defense contended that the state had failed to prove what Appellant's blood alcohol level was at the time of the accident. In rebuttal the assistant state attorney argued the following:

> Its your role in this case to decide what the facts are. . . It only makes sense his blood alcohol level had to be higher at the earlier time, and that at 11:20 his blood was going down. And we know the defendant didn't drink any alcoholic beverages after 10:00 p.m. when the crash occurred. (R 391)

During the charge conference defense counsel objected to an instruction concerning blood alcohol level, again on the grounds that no evidence was introduced to show Appellant's blood alcohol level at the time of the accident. (R 337-338) Judge Thompson noted the absence of any scientific testimony to relate the blood alcohol level introduced at trial back to the time of the accident, and stated, "I'm put in somewhat of a remarkable position." (R 339-340) However, he denied Appellant's motion and instructed the jury as requested by the state. (R 342)

Following deliberation the jury found Appellant guilty as charged on all three counts. However, as to counts I and III, the jury specifically did not find that Appellant was driving under the influence of alcohol to the extent that his normal faculties were impaired. Instead, the jurors chose an option on a special verdict form finding Appellant guilty of these two charges, "in as much as the defendant at the time he was driving had a blood alcohol level of .10 percent or higher." (R 409-410, 581, 583) (See appendix)

In a motion for new trial Appellant again argued that the evidence at trial was legally insufficient to prove that his blood alcohol level was .10 or greater at the time of the accident. (R 587-594) The motion was denied. (R 599)

At sentencing, Appellant argued that the injuries suffered by Kevin Trotter in the accident should be considered moderate, not severe, in calculating the sentencing guidelines scorehseet. (R 427-233) However the Court chose to score the injuries as severe. (R 432) Appellant was then sentenced within the recommended guidelines range to 15 years in prison for count I, DUI Manslaughter. (R 451, 603) As to count III Appellant was sentenced to five years probation. (R 453, 604) No sentenced was imposed nor were any sentencing guideline points scored, for count II, vehicular homicide, because the parties agreed that to sentence for both DUI Manslaughter and vehicular homicide would be a violation of Appellant's double jeopardy rights. (R 419-420)

Timely notice of appeal was filed, Appellant was adjudged insolvent and the Office of the Public Defender was appointed for appeal. (R 607, 608, 615)

SUMMARY OF ARGUMENT

Appellant contends herein that the trial court erred in denying his motions for judgment of acquittal as to the charges of DUI manslaughter and DUI causing serious bodily injury. The jury convicted of these two offenses based on a specific finding (by special verdict form) that Appellant's blood alcohol level was .10 percent or greater at the time he was driving. The only evidence offerred to prove BAL was a blood test taken about 1½ hours after the accident. No evidence was introduced which related this test result back to the time of the accident. In fact the state's expert witness specifically testified that she could not say that Appellant's BAL exceeded .10 at the time of the accident. The evidence was cleasrly insufficient to support the jury's verdict.

ARGUMENT

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTIONS FOR JUDGMENT OF ACQUITTAL AS TO THE CHARGES OF DUI MANSLAUGHTER AND DUI CAUSING SERIOUS BODILY INJURY.

In counts I and III of the information Appellant was charged pursuant to Section 316.193(1) with driving under the influence of alcoholic beverages. In count I it was charged that Appellant's driving resulted in the death of a human being. In count III it was charged Appellant's driving resulted in serious bodily injury to another. Both charges required that the jury find that at the time he was driving, Appellant was either (1) under the influence of alcoholic beverages to the extent that his normal faculties were impaired or (2) had a blood alcohol level of 0.10 percent or higher. § 316.193(1)(a), (b), Fla. Stat. (1987) Appellant's jury was presented with special verdict forms which allowed them to state which of these two conditions they found to exist. For both count I and count III the jury specifically found that "the defendant at the time he was driving had a blood alcohol level of .10 percent or higher. (R 581, 583) The jury specifically did not check the option finding that "at the time he was driving [Appellant] was under the influence of alcohol to the extent that his normal faculties were impaired." (see appendix) It is precisely the type of driving under the influence that the jury verdict found, that was addressed by Appellant in his motions for judgment of acquittal. Appellant

did not argues that the jury could not legally find that he was impaired. He argued that the jury could not legally find that his blood alcohol level was, at the time of the accident, .10 percent or higher. Appellant's motions should have been granted as to both counts I and III because there was in fact no legally competent, sufficient evidence upon which the jury could find that Appellant's blood alcohol level was .10 percent or greater at the time of the accident. Thus this Court must reverse Appellant's convictions.

Appellant's argument below and here on appeal is straight forward. The state's expert witness said that Appellant's blood alcohol level approximately 1½ hours after the accident was .11 percent. The witness specifially stated that she could not say whether Appellant's blood alcohol level at the time of the accident was .10 percent or greater. Thus, the state was asking the jury to speculate and make a scientific finding which an expert said was impossible.

This appears to be a case of first impression in Florida. The case of State v. Miller, 14 FLW 2653 (Fla. 3rd DCA November 14, 1989) deals with a related but distinctly different issue. In Miller the state appealed from an order granting a motion to suppress the results of a blood alcohol test in a drunk driving case. The trial judge granted the motion to suppress the results of a blood alcohol test prior to trial because the state's toxicologist said he could not testify within a reasonable degree of scientific certainty what the defendant's blood alcohol level was at the time he was driving. The appellate

court reversed finding the results of a blood alcohol test admissible. The Court point out that blood alcohol test results are specifically admissible pursuant to Section 316.1934(2), Florida Statutes (1987). In a paragraph that distinguishes Miller from Appellant's case, the Third District Court wrote:

> Moreover Section 316.193(1), Florida Statutes (1987), provides that an accused may be convicted under the statute for driving under the influence if it is proven either that the person was effected by the alcohol to the extent that his normal faculties were impaired or that his blood alcohol level was .10 percent or higher. Accordingly, the state is not necessarily required to prove that an accused's BAL was greater that .10 percent at the time of driving in order to convict him of driving under the influence of alcohol. The state may prove that, based on the totality of admissible evidence, including the test result, the defendant's normal faculties were impaired.

State v. Miller, supra., (emphasis in original) (citations omitted).

Appellant's case is distinguished by the fact that the jury specifically found that his blood alcohol level exceeded .10 and did not rely on a finding of impairment to convict. Appellant would concede for purposes of this argument that, because the issue of impairment was before the jury, his blood alcohol level test result was relevant and admissible. The issue here is different. The question is whether a BAL test result is sufficient evidence to prove beyond a reasonable doubt that Appellant's blood alcohol level was .10 or greater at the time of the accident. Clearly the evidence is legally insufficient to prove this element of the offenses based on the testimony of the

state's own expert witness.

In a recent case, Cox v. State, 14 FLW 600 (Fla. December 21, 1989), the Florida Supreme Court reaffirmed the standard of review in cases involving circumstantial evidence.

> . . . one accused of a crime is presumed innocent until proven guilty beyond and to the exclusion of a reasonable doubt. It is the responsibility of the state to carry this burden. When the state relies on purely circumstantial evidence to convict an accused, we have always required that such evidence must not only be consistent with the defendant's guilt but it must also be inconsistent with any reasonable hypothesis of innocence.

Id., quoting Davis v. State, 90 So.2d 629, 631 (Fla. 1956); McArthur v. State, 351 So.2d 972 (Fla. 1977).

The fact that Appellant's BAL was .11 at the time his blood sample was drawn is direct evidence of the percentage of alcohol in Appellant's blood at the time the blood was drawn. However it is only circumstantial evidence of what his blood alcohol level may have been at the time of the accident. Appellant's reasonable hypothesis of innocence is obvious - that his BAL was under .10 at the time of the accident and had risen to .11 by the time of the blood test. Despite the prosecutor's statements during closing arguments, it is wellestablished that, while blood alcohol level declines over time, the decline does not begin until sometime after the last drink, variously estimated at from 45 minutes to 90 minutes. People v. Mertz, 497 N.E. 2d 657, 660 (N.Y. 1986)(and cases cited therein). The state's own expert testimony establishes the reasonableness of Appellant's hypothesis of innocence. (R 295-296)

Several state court's have held that the result of a blood alcohol test can be admitted into evidence without requiring a "relation back" to time of driving. See, State v. Tischio, 527 A.2d 388 (N.J. 1987); People v. Kozar, 221 N.W. 2d 170 (Ct.App. Michigan 1974); Commonwealth v. Slingerland, 518 A.2d 266 (P.A. 1986). However none of these cases are precisely on point here. Two cases from Vermont are directly on point. Chapter 23, Vermont Statutes Annotated, Section 1201(a)(1) prohibits the operation of a motor vehicle on a highway by a person with a blood alcohol content of .10 content or more. Because the jury in Appellant's case convicted him only of the offenses relating to blood alcohol content, cases applying 23 VT.S.A. §1201(a)(1) are applicable. The Vermont Supreme Court has held that, "Proof of an offense under Section 1201(a)(1) requires the prosecution to produce evidence of the defendant's blood alcohol content and to relate that content back to the time of the operation of the automobile." State v. Rollins, 444 A.2d 884, 886 (Vermont 1982); State v. Dumont, 499 A.2d 787 (Vermont 1985). Further, at least one circuit court appellate panel in Florida has reversed a conviction for driving with an unlawful blood alcohol level based on the state's failure to produce testimony relating BAL test results back to the time the defendant was driving. Charles Bronson Lane v. State, 18th Judicial Circuit Court Appeal No. 88-05-AC.[1]

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[1]Appellant's counsel was unable to obtain a copy of the Lane opinion in time to include it with this initial brief.

In summary, the evidence concerning blood alcohol level introduced at Appellant's trial was legally insufficient to show that his blood alcohol level was .10 percent or greater at the time of the accident. Because the blood alcohol level requirement was an essential element of the jury's finding of guilt of the offenses of DUI manslaughter and DUI causing serious bodily injury, these convictions must be reversed.

CONCLUSION

Based on the arguments and authorities cited herein, Appellant respectfully requests that this court reverse his convictions for DUI manslaughter and DUI causing serious bodily injury and remand the cause to the trial court with instructions to discharge Appellant as to these two counts.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to the Honorable Robert A. Butterworth, Attorney General, 210 N. Palmetto Ave, Suite 447, Daytona Beach, FL 32114 in his basket at the Fifth District Court of Appeal and mailed to: Carl A Haas, P.O. Box 667, Bushnell, FL 33513, this 18th day of January, 1990.

DANIEL J. SCHAFER
ASSISTANT PUBLIC DEFENDER