047

IN THE SUPREME COURT OF FLORIDA

CASE NO. 77,213

DAVID LEE GALLAGHER,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

PETITIONER'S REVIEW FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

REPLY BRIEF OF PETITIONER

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ARGUMENT

I.

THE TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE THE RESULTS OF BLOOD ALCOHOL TESTS TAKEN AFTER THE ACCIDENT WHERE THE STATE COULD NOT RELATE THE BLOOD ALCOHOL LEVEL BACK TO THE TIME OF THE ACCIDENT, IN VIOLATION OF GALLAGHER'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO A FAIR TRIAL.

The first thing that must be noted about the State's answer on this issue is that the word "answer" does not accurately characterize the State's argument. The issue is whether the probative value of admitting the unextrapolated blood-alcohol test results is outweighed by its prejudicial effect. The State's answer brief never addresses the question and, therefore, fails to in any way establish how the probative value of the evidence might outweigh its prejudicial effect. Because the probative value of an unextrapolated test result is minimal and the danger of unfair prejudice and jury misuse is great, such test results should not be admitted. The admission here denied Gallagher a fair trial and requires reversal.

The State argues that the rule which Gallagher advocates would actually work to his detriment because it would allow the State to present evidence that the level was one which indicated "legal intoxication". That position is completely nonsensical. If the unextrapolated test result is inadmissible because of its prejudicial effect and the danger that the jury will misuse it to find actual intoxication at the time of the offense, then clearly it

would be improper for the State to elicit testimony which, while not stating the test result, indicated that it was at a level indicating "legal intoxication". The whole purpose for excluding the unextrapolated test result would be defeated if the State were allowed to elicit such testimony. Since testimony regarding legal intoxication would not be admissible, the State's contention that a rule excluding an unextrapolated blood-alcohol test result would work to a defendant's detriment is completely without merit.

Accordingly, petitioner urges this court to reverse and remand for a new trial and hold that unextrapolated blood-alcohol test results are inadmisssible.[1]

II

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY THAT IT COULD CONVICT GALLAGHER IF IT FOUND THAT GALLAGHER DROVE THE CAB WITH A .10 OR HIGHER BLOOD ALCOHOL LEVEL WHERE THERE WAS NO EVIDENCE ESTABLISHING THE BLOOD ALCOHOL LEVEL AT THE TIME OF THE ACCIDENT.

The State's position on this issue can only be characterized as being that even though the only witness who addressed the question, an expert, testified that it was not possible to determine Gallagher's blood-alcohol level at the time of the accident,

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[1] Petitioner notes that the rule need not be absolute. There may be circumstances in which the test result is extremely high and the test is performed close in time to the accident. If, under those circumstances, an expert can testify, within a reasonable degree of scientific certainty, that the blood-alcohol level at the time of the accident would have to be .10 or above, then the test result could be admitted.

the jury should be allowed to speculate that the blood-alcohol level was .10 or above at the time of the accident and convict Gallagher on that basis. That argument is illogical and contrary to all concepts of fairness. Where there was no evidence from which the jury could rationally conclude that Gallgher's blood-alcohol level was .10 or above at the time of the accident, it should not have been instructed that such a finding provided a basis for conviction.

III.

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR MISTRIAL MADE AFTER A VICTIM'S HEARSAY TESTIMONY THAT SHE HAD LEARNED THAT SHE WAS STRUCK BY A DRUNK DRIVER, IN VIOLATION OF GALLAGHER'S STATE AND FEDERAL CONSTITUTIONAL RIGHT TO CONFRONT WITNESSES AND TO A FAIR TRIAL.

The State contends that this error was not properly preserved for review. Defense counsel objected and, indicating that he believed the jury could not disregard the hearsay testimony, moved for a mistrial. Because it would have been impossible for the jury to "unring the bell" and pretend that some unknown and unconfronted witness had never told Ms. Meyer that a drunk driver had hit her, the failure to request the curative instruction did not waive the error. See, Malcolm v. State, 415 So.2d 891 (Fla. 3d DCA 1982) (noting the legendary ineffectiveness of instructions to disregard).

The error can be harmless, if at all, only if the numerous other opinions of intoxication, particularly the many lay opinions,

were admissible. Appellant contends that those opinions were not admissible and those erroneous admissions, especially together with the prejudicial effect of this hearsay testimony, require a new trial.

IV.

THE TRIAL COURT ERRED IN ALLOWING DR. BURNS, A RESEARCH PSYCHOLOGIST, TO TESTIFY (A) TO THE OPINION THAT GALLAGHER WAS IMPARIED IN HIS DRIVING ABILITIES WHEN THE ACCIDENT OCCURRED, AND (B) THAT THE LEGISLATURES OF THE UNITED STATES HAD ESTABLISHED A. .10 BLOOD ALCOHOL LEVEL AS THE LEVEL AT WHICH ONE IS AN UNSAFE DRIVER, IN VIOLATION OF HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO A FAIR TRIAL

The State first contends that appellant has misread the record in contending that Dr. Burns expressed an opinion that Gallagher was impaired at the time of the accident and maintains that she merely answered a proper hypothetical question. First, the hypothetical question, of course, contained exactly the facts which had been presented regarding the accident and Gallagher's condition during and after the accident. Secondly, and more importantly, the State completely ignores Dr. Burns' later testimony, where she is specifically asked about the "physical condition of the driver [Gallagher] of the taxicab on August 12, 1988 at the Seaport of Miami?" (T. 1683). Dr. Burns' response, of course, was that "his performance in general and his driving performance were impaired by alcohol." (T. 1684). Clearly, Dr. Burns defined impairment and then testified to the opinion that Gallagher was impaired at the time of the accident. (T. 1658, 1676, 1683-84). The record cannot

fairly be read in any other way and the State's attempt to indicate otherwise is a blatant misrepresentation. Accordingly, the State's cases on hypothetical questions are inapposite.

Expert opinion testimony is admissible when it will assist the trier of fact in understanding the evidence or determining a fact in issue. § 90.702, Fla. Stat. (1987). Where the facts testified to are of such a nature as not to require any special knowledge or experience for the jury to form conclusions from the facts, then expert opinions should not be allowed. Johnson v. State, 438 So.2d 774, 777 (Fla. 1983). Here, the jury could readily form conclusions about whether Gallagher was impaired, based upon the testimony about his condition, without the aid of expert testimony. Even if it were permissible to allow Dr. Burns to testify about the behavioral effects of certain blood-alcohol levels on people, it was error to allow her to express the opinion that Gallagher was impaired in his driving. See, State v. Hudson, 152 Ariz. 121, 730 P.2d 830, 834 (1986) (expert could testify to the effect of intoxication on defendant, but not to the extent of his intoxication at the time of the offense).

While it is true that opinions on ultimate issues are allowed, § 90.703, Fla. Stat. (1987), the Florida courts have repeatedly and continually held that when such an opinion amounts to an opinion on the guilt of the accused, it is impermissible. Glendening v. State, 536 So.2d 212, 221 (Fla. 1988), cert. denied, __ U.S. __, 109 S.Ct. 3219, 106 L.Ed.2d 569 (1989); Spradley v. State, 442 So.2d 1039, 1043 (Fla. 1983). In a context similar to the one in

this case, a DWI prosecution, the Arizona Supreme Court held that an opinion which parrots the words of the proscribing statute and declares that the defendant was driving while intoxicated amounts to an impermissible opinion on the defendant's guilt. Fuenning v. Superior Court, 139 Ariz. 590, 680 P.2d 121, 136 (1983). Here, the only issue in the case was whether Gallagher was under the influence of alcohol to the extent that his normal faculties were impaired. In that context, Dr. Burns was allowed to offer the opinion that Gallagher's "performance in general and his driving performance were impaired by alcohol". (T. 1684). The testimony was obviously an opinion on the defendant's guilt which, given the witness' expert status,[2] was particularly prejudicial and requires a new trial.

(B)

The State contends, without citing any authority, that Dr. Burns was qualified to testify "as to the readily verifiable fact of what numeric threshold the various state statutes set". State's answer brief at p. 19. The State, however, mischaracterizes her testimony by ignoring the fact that she rendered the legal opinion that the statutes established a blood-alcohol level "at which you are unsafe to drive". In other words, Burns, a research psychologist, testified not only to the level, but to the legal meaning of the level. She clearly was not qualified to do so and the State's

[2] The prosecutor relied heavily upon Dr. Burns' testimony in closing argument. (T. 1989, 1995-98).

position on this issue, unsupported by any citation to authority, is thoroughly unpersuasive.

V.

THE TRIAL COURT ERRED IN ALLOWING LAY WITNESSES TO EXPRESS OPINIONS THAT GALLAGHER WAS DRUNK, INTOXICATED, OR IMPAIRED BECAUSE (A) THE WITNESSES COULD HAVE ACCURATELY AND ADEQUATELY TESTIFIED TO THE FACTS THEY PERCEIVED WITHOUT OFFERING OPINIONS, AND (B) THE OPINIONS AMOUNTED TO EXPRESSIONS OF OPINIONS OF THE DEFENDANT'S GUILT, INVADING THE JURY'S PROVINCE AND DENYING GALLAGHER A FAIR TRIAL.

The State first contends that this issue was not properly preserved. Petitioner replies, as noted in his initial brief at n. 6, that (a) the admission of Valiente's opinion, especially when considered with the impermissible testimony of Dr. Burns and Martina Meyer, was sufficient to require reversal, and (b) admission of the other witnesses' opinions, especially in combination with the impermissible testimony objected to, constituted fundamental error by going to the heart of the case, an expression of opinion on Gallagher's guilt.

The State then accuses petitioner of doing an about face by first claiming, "in his fourth point on appeal, that drunkenness is a matter of common knowledge <u>open to the testimony of lay people</u> and not experts", and then arguing, on this point, "that the trial court should not have admitted the opinion of lay witnesses" on intoxication. State's answer brief at p. 21-22. (emphasis supplied). That argument only demonstrates that the State either (a) misunderstood petitioner's argument on the fourth issue, or (b)

is, in an attempt to confuse the court, misrepresenting that position.

Petitioner never contended in arguing the fourth issue that intoxication is a matter of common knowledge "open to the testimony of lay people". Petitioner's initial position on the fourth issue is that because intoxication is a matter of common experience and knowledge, it is therefore a subject upon which expert testimony is unnecessary. Simply because an issue is a matter of common experience and knowledge does not mean lay witnesses may offer opinions on the issue which amount to opinions on guilt. Appellant made no about face and there is nothing inconsistent about the positions taken on the two issues.

The State next ignores the primary authority on the issue, section 90.701(1), Florida Statutes (1987), and argues that caselaw from other jurisdictions is persuasive. Besides the obvious problem of ignoring Florida law, the State's reliance on caselaw from other jurisdictions is misplaced because those decisions generally derive from common law or statutes which either specifically authorize opinion testimony or authorize it when it is rationally based upon the witness's observation. See, Esquivel v. Nancarrow, 450 P.2d 399 (Ariz. 1969); Burke v. Tower East Restaurant, 37 A.D.2d 386, 326 N.Y.S.2d 32 (N.Y. App. Div. 1971); Ariz. Rev. Stat., Rules of Evid., R. 701 (1989); Ga. Code Ann. § 38-1708 (1989); Neb. Rev. Stat. § 27-701 (1989). Section 90.701(1), on the other hand, allows lay opinion testimony only when:

> The witness cannot readily, and with equal accuracy and adequacy, communicate what he has perceived to the trier of fact without testifying in terms of inferences or opinions and his use of inferences or opinions will not mislead the trier of fact to the prejudice of the objecting party,. . .

§ 90.701(1), Fla. Stat. (1987).

Accordingly, the cases are not helpful because they rely upon or interpret a rule of law different from the one established by the Florida legislature for the admission of lay opinion testimony.

This court recently held that a trial court did not err in allowing lay witnesses to opine that the defendant was not intoxicated a few hours before the alleged murder, especially where the defendant claimed he was in a constant state of intoxication. Occhicone v. State, 570 So.2d 902 F.L.W. 531, 532 (Fla. October 11, 1989). The court did not discuss or cite section 90.701(1), but did cite Carroll v. State, 353 So.2d 1268 (Fla. 1st DCA 1978). The decision in Carroll, with little or no analysis and no discussion of section of 90.701(1), approved the admission of numerous facts tending to prove intoxication, most of them objective, but one being the opinion that the defendant was "probably drunk". The Occhicone case is distinguishable because the testimony there was not, as it is here, an opinion on guilt. See, Glendening; Spradley.[3]

In Via v. State, 567 So.2d 543 (Fla. 2d DCA 1990), the Second District recently held that lay opinion testimony of a defendant's intoxication was properly admitted in a prosecution for D.U.I.

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[3] Petitioner submits that Carroll simply ignored section 90.701(1) and is wrongly decided.

resulting in serious bodily injury. The court not only did no analysis or discussion of section 90.701(1), but it relied upon the case of City of Orlando v. Newell, 232 So.2d 413 (Fla. 4th DCA 1970), a case decided before section 90.701(1) was enacted. The Newell case was based upon a rule similar to the one contained in the cases from other jurisdictions cited by the State, but different from the rule pronounced by the legislature in section 90.701(1). Therefore, Newell is inapplicable and Via, by relying on Newell, was wrongly decided.

This court should recognize and follow the legislative decision articulated in section 90.701(1) and hold that where, as here, lay witnesses can readily and with equal accuracy and adequacy testify, without offering an opinion or inference, regarding what they have perceived, then the opinion testimony is inadmissible. Zwinge v. Hettinger, 530 So.2d 318, 323 (Fla. 2d DCA 1988).[4]

Finally, as noted above, opinions on a defendant's guilt are inadmissible. Glendening; Spradley. Since the only issue in the case was whether Gallagher was impaired the opinions that he was drunk, intoxicated, or impaired were opinions on guilt, were extremely prejudicial, and require a new trial.

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[4] The State contends that the decision in Zwinge approved opinion testimony on intoxication. A reading of that case clearly indicates that the court merely noted that an opinion on intoxication was admitted into evidence. The court in no way addressed or approved the admission of that testimony.

CONCLUSION

Based upon the foregoing cases and authorities this Honorable Court is respectfully requested to reverse the judgment of the lower court.

Respectfully submitted,

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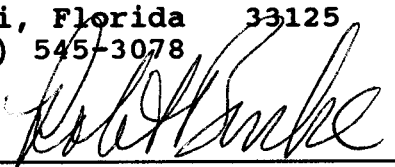
BY: 
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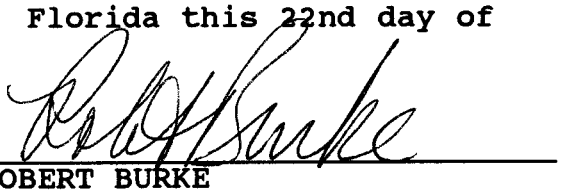
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail to the Office of the Attorney General, 401 N.W. 2nd Avenue, Suite N-921, Miami, Florida this 22nd day of April, 1991.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