047

IN THE SUPREME COURT OF THE STATE OF FLORIDA

CALVIN EARL BURKS,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.
_____/

CASE NO.: 79,122

ON APPEAL FROM THE FIFTH DISTRICT COURT OF APPEAL

LOWER COURT CASE NO.: 90-2340

REPLY BRIEF OF PETITIONER

The Petitioner, by and through his undersigned attorney, hereby files this Reply Brief on his behalf in the above cause, pursuant to Order of the Court.

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TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

STATUTES

RULES

ARGUMENT

POINT I:

JURISDICTION. Since the District Court certified the question posed in its opinion to this Court, this Court has jurisdiction pursuant to Article V, Section 3(b)(4).

Further, a reading of the opinion of the Court below shows it to be in express and direct conflict with the decision of the Supreme Court in State vs. Allen, 335 So.2d 823 (Fla. 1976) and also with the decision of the First District Court of Appeal in Farley vs. City of Tallahassee, 243 So.2d 161 (Fla. 1st DCA 1971). (See lower court opinion at pages 5 and 2, respectively.)

MERITS. The State fails to squarely address the issues, first, that aside from the Appellant's admissions, the State failed to introduce any evidence whatsoever at trial placing the defendant behind the wheel of the truck at or near the time of the alleged incident, or even linking the Appellant to the truck. There were no eyewitnesses to the accident and no indication of how much time elapsed from the alleged collision until Trooper Heaton observed the Appellant at the scene.

Further, there was no evidence indicating a likelihood that the truck had been driven by a drunken driver. All the State proved at trial was the position of a truck on the road, a motorcycle, a body, no skidmarks and good weather. (The evidence of running a stop sign argued by the State is based on the Appellant's statements (State's Brief at 5-6) and is therefore not relevant to the issue of corpus delicti.)

Second, the law of Florida (and this District) is that in DUI or DUI Resulting in Death cases, part of the corpus delicti is substantial evidence linking the accused as the driver of the vehicle independent of his own admissions. State vs. Allen, supra, (defendant seen driving the vehicle shortly before fatal accident); State vs. Hepburn, 460 So.2d 422 (Fla. 5th DCA 1984); Farley vs. City of Tallahassee, supra; County of Dade vs. Pedigo, 181 So.2d 720 (Fla. 3rd DCA 1966).

The case of Anderson vs. State, 467 So.2d 781 (Fla. 2nd DCA 1985) argued so forcefully by the State is not supportive of its position. In Anderson, an eyewitness (William Blackwelder, see note 1, 467 So.2d at 784) apparently testified to the defendant's truck running a stop sign at a high rate of speed into a busy intersection. In addition, Anderson was found lying (unconscious) next to the driver's side of the truck and numerous beer cans and a vodka bottle were found inside and outside the truck.

None of this kind of evidence was present in the case at hand, and none of the evidence places the Appellant (or any drunken driver) behind the wheel of the truck in this case.

The Appellant raised a timely objection to the admission of his statements based on lack of proof of the corpus delicti at the time the State introduced such evidence (R.109-110, 162-163). The trial court overruled the objection. The cross-examination of Trooper Heaton of admissions by the Appellant occurred after the Court's ruling and is not an abandonment by the Appellant of

his right to appellate review of the trial court's ruling on the corpus delicti issue.

In the posture of the facts of this case, the admission of the Appellant's statements were not harmless error. There could have been no conviction without them.

POINT 11:

JURISDICTION. Once the Supreme Court accepts a case for consideration, its review is not limited to the question certified. Bell vs. State, **394** So.2d 979, **980** (Fla. 1981); Zirin vs. Charles Pfizer and Company, **128** So.2d **594, 596** (Fla. **1961).**

MERITS: The State's argument that Burks' statements amounted to an admission but not a confession is not supported by any common sense view of the evidence. But even if true, the State fails to acknowledge clear precedent from this Court that admissions against interest are inadmissible where the corpus delicti of the crime has not been established by independent evidence (the same rule as for confessions), particularly where the admissions are made to law enforcement officers by persons under restraint. Hodges vs. State, 176 So.2d 91 (Fla. 1965); Parrish vs. State, 90 Fla. 25, 105 So. 130, 133 (1925).

The State's final argument that the admission of the Appellant's statements was harmless error because the other evidence against him was overwhelming is simply untrue and indicates an apparent intent on the part of the State to win this Appeal regardless of the facts or the law. Without Burks' statements to Trooper Heaton, the State could not possibly have convicted him of the crime charged.

POINT **111**:

JURISDICTION. The Appellant reasserts its position that this Court has jurisdiction of this issue and realleges and incorporates its arguments made in POINT 11, supra.

MERITS. The State's argument that the evidence admitted prior to the State's re-opening its case established causation (State's Brief 15-17) is clearly erroneous. There was no evidence of a collision between the truck and the motorcycle nor any evidence that the truck caused the motorcycle to crash.

The State assumes, without reason, that since the Troopers found the truck blocking the northbound lane, that it somehow must have done so when the motorcycle crashed. It is an equally valid assumption that the truck had nothing to do with the motorcycle found by the Troopers. Based on the State's initial evidence, the truck just as plausibly could have come upon the motorcycle after it had crashed, stopped to investigate and blocked the northbound lanes to prevent further collisions with the motorcycle and body by oncoming traffic until the police arrived.

The trial court correctly ruled that the evidence failed to show "that this truck caused that man (Courtemarche) to be on the pavement.". (R.153) (The State erroneously argues in its brief (p. 18, n.6) that the trial judge had required the State to prove that the motorcycle struck the truck).

The State does not squarely address the failure of the trial court to rule on the Appellant's Motion for Judgment of Acquittal

made when the State had so rested, as required by Rule 3.380, Fla.R.Cr.P., and cases cited in the Appellant's Initial Brief (p.18-19). Nor does the State respond to the issue of due process of law. The Appellant's objection went both to the failure of the Court to rule as well as to allowing the State to re-open its case.

In derogation of its own ruling (on causation) and the requirements of the above-cited law, the trial court reserved ruling and gave the State another chance to convict the Appellant - a fourth strike at the ball, a fifth down, a helping hand. Under this procedure, a defendant arguably suffers something akin to double jeopardy, but surely suffers a violation of his rights under Rule 3.380, the cases cited, and to due process of law.

If this procedure is condoned on appeal, then the cases cited above are overruled and the purpose of Rule 3.380 is degraded to a meaningless opportunity for the defense to critique the State's case so as to avoid reversal on fundamental grounds on appeal. Why would a defendant want to do that? Failure to prove an essential element of a crime charged is a fundamental ground requiring reversal on appeal. Henderson vs. State, 55 So.2d 111 (Fla. 1951); Dopler vs. State, 40 So.2d 363 (Fla. 1949); Thornton vs. State, 306 So.2d 205 (Fla. 1st DCA 1975). In a prosecution for DUI Resulting in Death, causation is an essential element to be proved by the State in order to sustain a conviction. Magaw vs. State, 537 So.2d 564 (Fla. 1989); State

vs. Naumowicz, 535 So.2d 702 (Fla. 1st DCA 1988); State vs. Kearney, 535 So.2d 711 (Fla. 2nd DCA 1988); O'Hara vs. State, 554 So.2d 26 (Fla. 1st DCA 1989).

POINT IV:

JURISDICTION: The Appellant reasserts its position that this Court has jurisdiction of this issue and realleges and incorporates its arguments made in POINT 111, supra.

MERITS. The State complains that the Appellant should have objected at trial to the admission of his statement on the same grounds which the Court not more than one-half hour previously had overruled in a pre-trial hearing. A further objection would clearly have been futile and formalistic only. There is no reason to believe a different ruling would have occurred at trial. But Appellant did raise the issue by Motion in Limine, which was appropriately heard before trial, the Court ruled against Appellant (did not reserve ruling) and the State and defense conducted the trial in obedience to that ruling. The State cited Anderson vs. State, in support of its argument, but that case is not even remotely relevant. The Appellant should be entitled to appellate review of the lower court's ruling on this issue.

On the merits, it is clear that the Appellant was never told that Trooper Heaton was switching to a homicide investigation out of which the Appellant could be charged with a criminal homicide. (R.59) Further, Trooper Kilpatrick, the alleged homicide investigator, never spoke to Appellant. (R.59,62,77) Nor did anyone advise the Appellant that different reports would be filed when the accident investigation ended and the criminal investigation began. Thus, under the cases cited in Appellant's

Initial Brief (pp. 26-29) the Appellant's conviction should be reversed.

Finally, the State totally fails to respond to the Appellant's further argument that his Fifth Amendment privileges against self-incrimination are violated where the State first compels incriminating statements during the accident investigation but thereafter elicits the same incriminating statements during the criminal investigation without first advising the Appellant (in addition to his Miranda rights) that none of the statements previously made during the accident investigation can be used against him in the criminal investigation. In the context of the compelled disclosure required by F.S. 316.066 of all Florida drivers involved in an accident out of which criminal charges may arise, something more than the mere advisement of Miranda rights is needed to safeguard the constitutional privilege against self-incrimination where the "criminal" investigation follows the "accident" investigation (and the accused has made incriminating statements in the former).

CONCLUSION

The Appellant requests that the Court will find it has jurisdiction of the issues herein and will reverse the Appellant's conviction if the Court agrees with any one of the four issues raised by Appellant.

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 mail, to Assistant Attorney General, Judy Taylor Rush, 210 South Palmetto Avenue, Daytona Beach, Florida 32114, this 2nd day of March, 1992.

Jeffrey L. Dees