IN THE SUPREME COURT OF THE STATE OF FLORIDA

MICHAEL E. DOBBINS,

Petitioner,

v. Case No. 80,580

STATE OF FLORIDA,

Respondent.

_____/

ON DISCRETIONARY REVIEW FROM THE
DISTRICT COURT OF APPEAL, FIFTH DISTRICT
AND THE SEVENTH JUDICIAL CIRCUIT,
IN AND FOR VOLUSIA COUNTY, FLORIDA

RESPONDENT'S BRIEF ON JURISDICTION

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SUMMARY OF ARGUMENT

Respondent respectfully suggests that this honorable court should not exercise its extraordinary jurisdiction to review the decision rendered in this case because the precise issue is presently pending before this court in another case.

ARGUMENT

SINCE THE SAME ISSUE PRESENTED IN THIS CASE IS PRESENTLY PENDING IN THIS COURT, EXTRAORDINARY JURISDICTION SHOULD NOT BE EXERCISED TO REVIEW THE DECISION BELOW.

The decision in this case holds that Florida's "hate crime" statute, section 775.085, Florida Statutes (1989), is valid and not in violation of the state or federal Constitutions. Dobbins v. State, 17 F.L.W. D 2222 (Fla. 5th DCA September 24, 1992) Respondent agrees that this court could exercise its discretion to review this case. However, this Court will decide this issue in the pending case of State v. Stalder, Case No. 79,924. This case has been fully briefed, and oral argument was held on September 1, 1992. Briefs or argument in the instant case would not significantly add to this honorable court's disposition of this issue.

Respondent understands that the district court did not issue a decision in the Stalder case, but certified a question directly to this court for resolution by unpublished order. Therefore, petitioner correctly states that the instant decision is the first appellate opinion on the topic; no conflict between decisions exists. Therefore, Jollie v. State, 405 So.2d 418 (Fla. 1981), is not controlling precedent in this case. However, should this court consider the Jollie decision applicable in this situation, it suggests an alternative resolution of this case: accept jurisdiction and consolidate this case with the Stalder case. Id.

Mandate issued in this case from the District Court of Appeal, Fifth District, on October 12, 1992. Mr. Dobbins has completed the incarcerative portion of his sentence and is currently on probation. If this court or the district court recalls mandate and orders it stayed pending resolution of the Stalder decision, then the same legal result would be reached without accepting jurisdiction in this case. Fla.R.App.P. 9.340.

Although respondent agrees that this court could exercise jurisdiction, and agrees that this case is suitable for consideration by this court by virtue of the importance of the issue presented, respondent nevertheless suggests that this honorable court should not exercise its extraordinary jurisdiction to review an issue which will be decided in another case.

CONCLUSION

Based upon the argument and authority presented, respondent respectfully requests this honorable court to decline to accept jurisdiction in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing brief on jurisdiction has been furnished, by U.S. MAIL to Jeffrey L. Dees counsel for petitioner at 347 S. Ridgewood Avenue, Post Office Drawer 2600, Daytona Beach, FL 32115-2600, this 23d day of October, 1992.

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IN THE SUPREME COURT OF THE STATE OF FLORIDA

MICHAEL E. DOBBINS,

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v. Case No. 80,580

STATE OF FLORIDA,

Respondent.

_____/

APPENDIX TO RESPONDENT'S BRIEF ON JURISDICTION

Dobbins v. State, 17 F.L.W. D 2222 (Fla. 5th DCA 9/24/92)

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(AMANTIS, J., dissenting.) I respectfully dissent from the majority opinion and join in Judge Griffin's dissent because in my opinion her dissent reasonably balances the public policy of requiring child abuse or neglect to be reported with the policy of protecting the child's right to have effective treatment after having been victimized and having suffered a very traumatic experience with long-lasting effects.

A statute must be construed and applied so as to give effect to the evident legislative intent, regardless of whether such construction varies from the statute's literal meaning "if, from a view of the whole law, or from other laws *in pari materia* the evident intent is different from the literal import of the terms employed to express it in a particular part of the law, that intent should prevail, for that, in fact is the will of the Legislature." *Forsythe v. Longboat Key Beach Erosion Control District*, 17 F.L.W. S377, 378 (Fla. June 25, 1992) *quoting Van Pelt v. Hilliard*, 75 Fla. 792, 798-799, 78 So. 693, 694-695 (1918); *Griffis v. State*, 356 So.2d 297, 299 (Fla. 1978). In *Griffis*, the Florida Supreme Court relied upon its opinion in *Beebe v. Richardson*, 156 Fla. 559, 23 So.2d 718, 719 (1945), in which the Court explained:

> [W]here the context of a statute taken literally conflicts with a plain legislative intent clearly discernible, the context must yield to the legislative purpose, for otherwise the intent of the lawmakers would be defeated. (Citations omitted).

Griffis, 356 So.2d at 299.

The legislative intent and public policy of sections 415.502-415.514, Florida Statutes (1989) is to require that reports of child abuse or neglect be made to the Department of Health and Rehabilitative Services in order to prevent further harm to the child or other children living in the home and to preserve the family life.[1] In the instant case, the child abuse had been reported by the children's mother to HRS *prior* to the time that the children were referred to the psychologists for treatment. Because the child abuse had already been reported, the salutary purpose of the statutory scheme has been accomplished and thus, there no longer exists any compelling public policy reason or necessity for abrogating the privilege between the psychologists and their patients.

If the children were referred by the treating psychologists to other professionals for evaluation or treatment, the majority opinion's literal application of the statutory abrogation of the privilege[2] would result in disclosure of the children's communications to those professionals without balancing the necessity to report the child abuse which had been previously reported. The Legislature obviously did not intend to negatively impact the child's psychological evaluation and treatment by requiring unlimited disclosure of confidential communications involving personally sensitive and traumatic experiences when there is absolutely no need to do so. The reasonable and evident legislative intent was to abrogate the privilege to the extent necessary to accomplish the legislative policy of insuring that child abuse be reported. I submit that we should follow this legislative policy and that we should not unnecessarily and unreasonably expand it.

I concur in certifying this matter to the Florida Supreme Court because it involves questions of great public importance. (GOSHORN, C.J., concurs.)

[1] §415.502, Fla. Stat. (1989).
[2] §415.512, Fla. Stat. (1989).

* * *

Criminal law—Hate crimes—Statute providing for enhancement of offense if the commission of offense evidences prejudice based on the race, color, ancestry, ethnicity, religion or national origin of the victim is not unconstitutionally vague and overbroad and does not unconstitutionally punish opinion—Language of statute cannot be read to apply to situation in which defendant commits a race, color or religious neutral crime, but during the commission of the offense makes a racial slur—Act of choosing a victim for a crime because of his race or religion is a type of speech that is subject to regulation—Statute is justified because it is narrowly tailored to serve the compelling state interest of ensuring the basic human rights of members of groups that have historically been subjected to discrimination because of membership in those groups

MICHAEL EARL DOBBINS, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 91-1953. Opinion filed September 24, 1992. Appeal from the Circuit Court for Volusia County, Shawn L. Briese, Judge. Jeffrey L. Dees, Ormond Beach, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Judy Taylor Rush, Assistant Attorney General, Daytona Beach, Michael Neimand, Miami, and Richard Doran, Tallahassee, for Appellee. Kenneth W. Shapiro of Berger & Shapiro, P.A., Ft. Lauderdale, for Amicus Curiae, Anti-Defamation League of B'Nai B'rith.

(HARRIS, J.) John Daly, a Jewish youth, in protest to his parents and denial of his religion, joined the "Skinheads", an association openly and vociferously anti-Semitic. Ultimately, when his fellow members learned of his Jewish background, some of them decided to take action.

He was beaten by several members of the association, including Michael Earl Dobbins, appellant herein. During the beating, Dobbins and others made such statements as "Jew boy," and "Die Jew boy."

Dobbins was tried and convicted under the battery statute (Fla. Stat. 784.03(1)(a)) and sentenced under the enhancement provisions of the hate crime statute (Fla. Stat. 775.085).

We find the evidence sufficient to uphold the jury's verdict that Dobbins committed the proscribed act and that the commission of the act evidenced prejudice based on Daly's "ancestry, ethnicity, religion or national origin".

The sole issue that we find merits discussion is the constitutionality of section 775.085, Florida Statutes (1989). We find it to be constitutional.

VAGUE AND OVERBROAD

Appellant first contends that the statute is vague and overbroad. He contends the statute is susceptible of applying to protected speech because it does not require that the prejudice alleged have any specific relationship to the commission of the crime.

This argument seems to concede that if the statute permits enhancement only upon proof, beyond a reasonable doubt, that appellant committed the battery motivated, in whole or in part, because Daly was Jewish, the enhanced penalty would be appropriate.

That is precisely the way we read the statute. Section 775.085 provides:

> The penalty for any felony or misdemeanor shall be reclassified as provided in this subsection if *the commission of such felony* or misdemeanor *evidences prejudice based on the* race, color, *ancestry, ethnicity, religion* or national origin *of the victim.*

Appellant urges that the language can be read to apply to a situation in which the defendant commits a race, color or religious neutral crime (for example, resisting arrest because he thinks he's innocent), but during the commission of the offense makes a racial slur. We do not agree. The statute requires that it is the *commission of the crime* that must evidence the prejudice; the fact that racial prejudice may be exhibited during the commission of the crime is itself insufficient.

In the present case the jury was required to find that the *beating*, based on the background and relationship between the participants *and* the statements made during the beating, *evidenced that Daly was the chosen victim because he was Jewish.* Had the fight occurred for some other reason (over a woman, because of an unpaid debt, etc.), the mere fact that Daly might have been called a "Jew boy" could not enhance the offense.

PUNISHMENT OF OPINION

The more troubling argument made by Dobbins is that the

enhancement provision punishes opinion. We find the statute involved in this case sufficiently different from the St. Paul ordinance so that *R.A.V. v. City of St. Paul*, __ U.S. __, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992), is not dispositive.[1]

First, *R.A.V.* dealt with an ordinance that expressly made criminal the placing "on public or private property a symbol . . . which one knows . . . arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender . . ." This clearly makes criminal the public expression of an intolerant opinion. We agree that the First Amendment prohibits intrusion into the rights of one to freely hold and express unpopular, even intolerant, opinions.

But section 775.085 does not punish intolerant opinions. Nor does it punish the oral or written expression of those opinions. It is only when one acts on such opinion to the injury of another that the statute permits enhancement.

John Stuart Mills in his *On Liberty*[2] points out this distinction:

> Such being the reasons which make it imperative that human beings should be free to form opinions, and to express their opinions without reserve; and such the baneful consequences to the intellectual, and through that to the moral nature of man, unless this liberty is either conceded, or asserted in spite of prohibition; let us next examine whether the same reasons do not require that men should be free to act upon their opinions—to carry these out in their lives, without hinderance, either physical or moral, from their fellow men, so long as it is at their own risk and peril.
>
> This last provision is of course indispensable. No one pretends that actions should be as free as opinions. On the contrary, even opinions lose their immunity when the circumstances in which they are expressed are such as to constitute their expression a positive instigation to some mischievous act. An opinion that corn dealers are starvers of the poor . . . ought to be unmolested when simply circulated through the press, but may justly incur punishment when delivered orally to an excited mob assembled before the house of a corn-dealer . . . Acts, of whatever kind, which, without justifiable cause, do harm to others, may be, and in the more important cases absolutely require to be, controlled by the unfavorable sentiments, and, when needful, by the active interference of mankind.

We believe that the act of choosing a victim for a crime because of his race or religion is a type of speech that is subject to regulation.

We recognize that other courts have reached a different result under similar facts and similar law.

The Court in *State v. Mitchell*, 485 N.W. 2d 807, 812 (Wis. 1992) stated:[3]

> Without doubt the hate crime statute punishes bigoted thought. The state asserts that the statute punishes only the "conduct" of intentional selection of a victim. We disagree. Selection of a victim is an element of the underlying offense, part of the defendant's "intent" in committing the crime. In any assault upon an individual there is a selection of the victim. The statute punishes the "because of" aspect of defendant's selection, the *reason* the defendant selected the victim, the *motive* behind the selection.

We concede, as we must, that the defendant's motive is implicated in this issue. But that does not mean that the prohibited conduct is not subject to regulation.[4] As the Supreme Court stated in *R.A.V.*:

> From 1791 to the present, however, our society, like other free but civilized societies, has permitted restrictions upon the content of speech in a few limited areas, which are "of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."
>
> * * *
>
> We have long held, for example, that nonverbal expressive activity can be banned because of the action it entails, but not because of the ideas it expresses.

R.A.V., 112 S.Ct. at 2542-4.

The purpose of section 775.085 is to discourage through greater penalties the discrimination against someone (by making such person the victim of a crime) because of race, color, or religion. How does this differ from any discrimination prohibition? The refusal to hire a woman cannot be justified under 42 U.S.C. section 2000e-2, 29 C.F.R. section 1604.11 (1991) because it is the expression of the employer's opinion that women should not be in the work place. The rejection of Blacks from a jury is not exempted from the consequences of *Powers v. Ohio*[5] and *State v. Neil*[6] because it is an expression of the attorney's or client's opinion that Blacks are incompetent.

In such cases it is not the *content* of the speech that is prohibited, but such *act* of discrimination. It does not matter why a woman is treated differently than a man, a Black differently than a White, a Catholic differently than a Jew; it matters only that they are.

So also with section 775.085. It doesn't matter that Dobbins hated Jewish people or why he hated them; it only mattered that he discriminated against Daly by beating him because he was Jewish. This, we think, meets the Supreme Court test in *R.A.V.*:

> Thus, for example, sexually derogatory "fighting words," among other words, may produce a violation of Title VII's general prohibition against sexual discrimination in employment practices [citation omitted]. Where the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy.

R.A.V. at 2546-7.

The Supreme Court in *R.A.V.* made it clear that they were not addressing victim specific discrimination when it said:

> What we have here, it must be emphasized, is not a prohibition of fighting words that are directed at certain persons or groups (which would be *facially* valid if it met the requirements of the Equal Protection Clause) . . .

Id. at 2548.

In our case there is no equal protection challenge to section 775.085 which does prohibit "fighting words" directed at certain groups.

There is yet another reason we find the statute constitutional. Even if the statute is considered to regulate the content of speech, it is nonetheless justified because it is narrowly tailored to serve the compelling state interest of ensuring the basic human rights (not to be a target of a criminal act) of members of groups that have historically been subjected to discrimination because of membership in those groups.

The Supreme Court in *R.A.V.* recognized this as a proper reason for regulating content and stated:

> The dispositive question in this case, therefore, is whether content discrimination is reasonably necessary to achieve St. Paul's compelling interest.

Id. at 2550.

In *R.A.V.*, the Supreme Court held that it was not. But again in *R.A.V.* the Court was dealing with an ordinance that regulated specific speech content that St. Paul considered to violate the rights "of such group members to live in peace where they wish." The Court held that the same beneficial effect sought by St. Paul could have been obtained with a less intrusive ordinance that did not target the specific content prohibited by the ordinance. For example, the ordinance could provide that it was a violation to molest Jewish people because of their religion. This would not regulate the content of speech but rather the act of religious molestation. In our case, it is the act of discrimination against people because of their race, color or religion by making them victims of crime that is prohibited and punished, not the specific opinion that leads to that discrimination. We think that appropriate.

AFFIRMED. (GOSHORN, C.J., and DAUKSCH, J., con-

cur.)

[redacted]We notice also that in R.A.V. the defendant did not appeal, and the Supreme Court did not consider, his conviction of a racially motivated assault. It is this issue, in essence, that is before us.

[2]John Stuart Mill, On Liberty 119 (Penguin Books Ltd., 1974) (1st ed. 1859).

[3]*See also* State v. Wyant, 64 Ohio St.3d 566, 597 N.E.2d 450 (Ohio 1992).

[4]For example, the Supreme Court in Barclay v. Florida, 463 U.S. 939, 103 S.Ct 3418, 77 L.Ed.2d 1134 (1983), held that a sentencing judge in a capital case might properly take into consideration "the elements of racial hatred" in Barclay's crime as well as "Barclay's desire to start a race war." If a court may properly consider such racial hatred in determining whether to impose a harsher sentence, may not the legislature mandate that the judge do so? Is it proper for the court but not the legislature?

[5]__ U.S. __, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991).

[6]457 So.2d 481 (Fla. 1984).

* * *

Criminal law—Apparently erroneous admission of testimony in which four eye witnesses said they thought defendant caused the accident out of which criminal charges arose was harmless in view of other overwhelming evidence that defendant caused accident—Trial court properly declined to adjudicate defendant guilty on reckless driving count after jury found her guilty of that charge as lesser included offense of vehicular homicide where trial court submitted both DUI manslaughter charge and vehicular homicide charge to jury, although only single death was involved, and jury returned verdict of guilt on DUI manslaughter charge

LISA COLLINS, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 91-1027. Opinion filed September 25, 1992. Appeal from the Circuit Court for Marion County, Thomas D. Sawaya, Judge. James B. Gibson, Public Defender, and Paolo G. Annino, Assistant Public Defender, Daytona Beach, for [redacted]llant. Robert A. Butterworth, Attorney General, Tallahassee, and Rebecca [redacted]all, Assistant Attorney General, Daytona Beach, for Appellee.

(SHARP, W., J.) Collins appeals from her judgment and sentence for DUI/manslaughter,[1] DUI with serious bodily injuries,[2] driving with a suspended license,[3] and reckless driving.[4] Collins was adjudicated guilty at trial of the first three crimes but not the last, because the judge thought double jeopardy applied. However, the judgment and sentence forms include the reckless driving count. The judgment also lists the DUI with serious injuries as a second degree felony, whereas it is a third degree felony.[5] Aside from those two errors, we affirm.

These criminal charges grew out of an accident which occurred when Collins drove her vehicle through a red light at high speed and hit a truck and a car in the intersection. The driver of the car (Notholt) was killed and the passenger seriously injured. Collins argues on appeal that the trial judge should have prevented four eyewitnesses to the accident from testifying they thought Collins caused the accident. Although admission of this testimony appears erroneous, there was overwhelming evidence to support the jury's conclusion that Collins caused the accident. We therefore view the error as harmless. *State v. DiGuilio*, 491 So.2d 1129 (Fla. 1986).

We think the trial court properly declined to adjudicate Collins on the reckless driving count. In the amended information, Lisa was charged with DUI/Manslaughter resulting in the death of Barbara Notholt and with the vehicular homicide resulting in the death of Barbara Notholt. Even though they are separate crimes, the courts have held that a person cannot be convicted of DUI/Manslaughter and vehicular homicide for the same death. *Houser v. State*, 474 So.2d 1193 (Fla. 1985); *Stancato v. State*, 526 [redacted]2d 723 (Fla. 3d DCA 1988); *Vela v. State*, 450 So.2d 305 [redacted]. 5th DCA 1984). This court has concluded that the rule that there is only one homicide conviction for a single death survives the statutory amendment to section 775.021(4). *Logan v. State*, 592 So.2d 295 (Fla. 5th DCA 1991), *cause dismissed*, 599 So.2d 656 (Fla. 1992). *Accord Kurtz v. State*, 564 So.2d 519 (Fla. 2d DCA 1990) (question certified). *Contra Murphy v. State*, 578 So.2d 410 (Fla. 4th DCA 1991) (question certified).

Thus it appears Collins could not be convicted of both DUI/Manslaughter and vehicular homicide for the death of Ms. Notholt. Both charges, however, were submitted to the jury. The jury found Collins guilty of DUI/Manslaughter. It did not find Collins guilty of vehicular homicide but instead found her guilty of reckless driving.

Reckless driving is a necessarily included offense of vehicular homicide. *State v. Barritt*, 531 So.2d 338 (Fla. 1988); *Chikitus v. Shands*, 373 So.2d 904 (Fla. 1979); *Rushton v. State*, 395 So.2d 610 (Fla. 5th DCA 1981). Vehicular homicide is the killing of a human being by the operation of a motor vehicle by another in a reckless manner likely to cause the death of or great bodily harm to another. § 782.071(1), Fla. Stat. (1989). Reckless driving is driving any vehicle with a willful or wanton disregard for the safety of persons or property. § 316.192(1), Fla. Stat. (1989).

In contrast, DUI/Manslaughter requires proof only of *simple negligence* while operating an automobile under the influence of alcohol. *Magaw v. State*, 537 So.2d 564 (Fla. 1989). Reckless operation of the vehicle is *not* a required element of the crime of DUI/Manslaughter. *Murphy v. State*, 588 So.2d at 411. But, since the jury found Collins guilty of DUI/Manslaughter, a guilty verdict for vehicular homicide (or its lesser includeds) would have to be set aside under the one death/one conviction rule.[6]

Accordingly, we affirm the convictions and sentences on the first three counts. However, we vacate the judgment and sentence for reckless driving. We also note on remand the judgment form which improperly states that the second count (DUI with serious injuries) is a second degree felony, should be corrected.

AFFIRM in part; REVERSE in part; REMAND. (GOSHORN, C.J., and HARRIS, J., concur.)

[1]§ 316.193(3)(a)(b)(c)3, Fla. Stat. (1989).

[2]§ 316.193(3)(a)(b)(c)2, Fla. Stat. (1989).

[3]§ 322.34(3), Fla. Stat. (1989).

[4]§ 316.192, Fla. Stat. (1989).

[5]§ 316.193(3)(a)(b)(c)2, Fla. Stat. (1989).

[6]DUI/Manslaughter is a felony of the second degree, § 316.193(3)(a)(b)(c)3. Vehicular homicide is a felony of the third degree, § 782.071(1). Reckless driving is a misdemeanor, § 316.192. Since DUI/Manslaughter is the highest degree crime, it would stand and the others would be set aside.

* * *

Criminal law—Juveniles—Error to place juvenile in secure detention after adjudication of delinquency for contempt of court

T.R.A., a Child, Petitioner, v. STATE OF FLORIDA, et al., Respondents. 5th District. Case No. 92-2157. Opinion filed September 21, 1992. Petition for Writ of Habeas Corpus, A Case of Original Jurisdiction. Joseph W. DuRocher, Public Defender, and Barry W. Hepner, Assistant Public Defender, Orlando, for Petitioner. Robert A. Butterworth, Attorney General, Tallahassee, and Barbara C. Davis, Assistant Attorney General, Daytona Beach, for Respondents.

(PER CURIAM.) Petitioner, a child, was placed in secure detention after being adjudicated delinquent for contempt of court and seeks a writ of habeas corpus. In *A.A. v. Rolle*, 17 F.L.W. 561 (Fla. July 23, 1992) the Florida Supreme Court held that under Chapter 39, juveniles may not be incarcerated for contempt of court by being placed in secure detention. We deny the state's request that we hold the case in abeyance pending the outcome of the motion for rehearing in *A.A. v. Rolle* and grant the petition and issue the writ of habeas corpus for the immediate release of the child from secure detention on the conviction for contempt. We do so with considerable disgust. In this case the juvenile contemptuously told the trial judge, "Screw you," a fairly obvious expression of his contempt for the juvenile court system. That contempt has now been justified, since the contemner goes unpunished. The observation in the dissenting opinion in *Rolle* by Justice Overton bears reemphasis:

> The juvenile justice system already has substantial problems and, after this decision, the juvenile court will have no real