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IN THE SUPREME COURT OF FLORIDA



STATE OF FLORIDA,

Petitioner,

v. CASE NO. 80,691

RALPH CHAPMAN,

Appellee.

_____/

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

# MERITS BRIEF OF PETITIONER

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## STATEMENT OF THE CASE AND FACTS

Respondent was charged by information with one count of DUI manslaughter and one count of vehicular homicide (R 246). The charges arose from a single accident involving one death (R 246). After a trial by jury, respondent was found guilty as charged on both counts (R 223, 296).

Prior to sentencing, respondent filed a motion to set aside conviction of vehicular homicide arguing that where one death is involved a defendant cannot be convicted of both DUI manslaughter and vehicular homicide (R 300). The trial judge denied the motion (R 236, 302). Respondent was sentenced to 7 years incarceration followed by 3 years probation on each count to run concurrently (R 241, 313, 314). The sentence imposed was within the guidelines (R 318). Respondent conceded that eliminating the vehicular homicide conviction from the scoresheet would not change respondent's recommended guidelines sentence (R 234, 237).

On appeal, the Fifth District held as follows:

> Chapman was convicted of both DUI manslaughter and vehicular homicide, sections 316.193 and 782.071, Florida Statutes (1991). Both offenses resulted from a single automobile accident. We must vacate the conviction and sentence for vehicular homicide based upon the decisions in Houser v. State, 474 So. 2d 1193 (Fla. 1985), and Logan v. State, 592 So. 2d 295 (Fla. 5th DCA 1991), dismissed, 599 So. 2d 656 (Fla. 1992). We affirm the conviction for DUI manslaughter and remand for resentencing.
>
> * * *

Chapman v. State, 604 So. 2d 942 (Fla. 5th DCA 1992).

Petitioner filed a notice to invoke the discretionary jurisdiction of this court and jurisdictional briefs were thereafter filed. On February 23, 1993, this court accepted jurisdiction of the instant cause. This merits brief follows.

## SUMMARY OF ARGUMENT

Pursuant to §775.021(4), a defendant may properly be convicted of both DUI manslaughter and vehicular homicide resulting from one accident. The test for determining whether multiple convictions and sentences is proper is whether each offense requires proof of an element the other does not. The test is not whether each statute addresses "essentially the same evil." Where each offense does require proof of an element the other does not, multiple convictions and sentences are proper. The legislature clearly set forth its intent in §775.021(4)(b) to convict and sentence for each criminal offense committed in the course of one criminal episode. The assumption is no longer that the legislature did not intend multiple punishments, but that it did so intend. There is nothing to indicate that the legislature did not intend a defendant to be punished for both DUI manslaughter and vehicular homicide. Had the legislature not intended dual convictions and sentences petitioner asserts that the legislature would have provided a clear statement of that intent.

## ARGUMENT

### POINT ON APPEAL

PURSUANT TO SECTION 775.021(4), A DEFENDANT MAY PROPERLY BE CONVICTED OF BOTH DUI MANSLAUGHTER AND VEHICULAR HOMICIDE RESULTING FROM ONE ACCIDENT, AS EACH OFFENSE REQUIRES PROOF OF AN ELEMENT THE OTHER DOES NOT.

The respondent in the instant case was charged with and convicted of one count of DUI manslaughter and one count of vehicular homicide. The two offenses arose from a single accident resulting in one death. On appeal the Fifth District vacated respondent's conviction for vehicular homicide based upon this court's decision in Houser v. State, 474 So. 2d 1193 (Fla. 1985). Petitioner asserts this was error and the conviction and sentence for vehicular homicide should be reinstated.

Section 775.021(4), Fla. Stat. (1991), provides as follows:

> (a)Whoever, in the course of one criminal transaction or episode, commits an act or acts which constitute one or more separate criminal offenses, upon conviction and adjudication of guilt, shall be sentenced separately for each criminal offense; and the sentencing judge may order the sentences to be served concurrently or consecutively. For purposes of this subsection, offenses are separate if each requires proof of an element that the other does not, without regard to the accusatory pleading or proof adduced at trial.
>
> (b)The intent of the legislature is to convict and sentence for each criminal offense committed in the course of one criminal episode or transaction and not to allow the principle of lenity as set forth in

> subsection (1) to determine legislative intent. Exceptions to this rule of construction are:
>
> 1. Offenses which require identical elements of proof.
>
> 2. Offenses which are degrees of the same offenses as provided by statute.
>
> 3. Offenses which are lesser offenses the statutory elements of which are subsumed by the greater offense.

Section 775.021(4) is a codification of Blockburger v. United States, 284 U.S. 299 (1932). Section 775.021(4) was amended in 1988 in response to this court's decision in Carawan v. State, 515 So. 2d 161 (Fla. 1987). Prior to this legislative amendment, the controlling rule as to whether an individual could be convicted for both DUI manslaughter and vehicular homicide arising from a single accident resulting in one death was set forth in this court's decision in Houser, supra.

Houser was charged with DWI manslaughter and vehicular homicide. Houser, at 1194. This court acknowledged that under the Blockburger analysis, DWI manslaughter and vehicular homicide are separate crimes. Id., at 1196. However, this court went on to state that Blockburger and its statutory equivalent in 775.021(4) "are only tools of statutory interpretation which cannot contravene the contrary intent of the legislature." Id. Furthermore,

> . . . '[t]he assumption underlying the Blockburger rule is that [the legislative body] ordinarily does not intend to punish the same offense under two different

> statutes.' . . . While the legislature is free to punish the same crime under two or more statutes, it cannot be assumed that it ordinarily intends to do so.

Id. (Citation omitted). In holding that an offender could not be punished for both DWI manslaughter and vehicular homicide, this court noted that "Florida courts have repeatedly recognized that the legislature did not intend to punish a single homicide under two different statutes." Houser, at 1197.

In Carawan, supra, this court set forth rules for statutory construction and explained their application. Carawan, at 165-168. This court then proceeded to examine its prior decisions in light of that statutory analysis. Id., at 169-170. In particular, this court examined its decision in Houser. Id., at 170. Concerning Houser, this court stated the following:

> . . . [W]e noted that the legislature is presumed not to intend to punish a single homicide under two separate statutes. We thus found dual convictions for DWI manslaughter and vehicular homicide improper where both arose from a single death. As in Mills[ v. State, 476 So. 2d 172 (Fla. 1985)], the two statutes in question addressed essentially the same evil, i.e., driving a vehicle in a manner likely to cause a fatal injury to another human being. Finding no legislative intent to the contrary, we therefore resolved all doubts in favor of lenity. . . .

Carawan, at 170.

As previously stated, Carawan was overridden by the legislature at the legislative session following the issuance of that decision. State v. Smith, 547 So. 2d 613, 615 (Fla. 1989).

The legislature amended §775.021(4) to include a specific statement of legislative intent:

> (b)The intent of the legislature is to convict and sentence for each criminal offense committed in the course of one criminal episode or transaction and not to allow the principle of lenity as set forth in subsection (1) to determine legislative intent. Exceptions to this rule of construction are:
>
> 1. Offenses which require identical elements of proof.
>
> 2. Offenses which are degrees of the same offenses as provided by statute.
>
> 3. Offenses which are lesser offenses the statutory elements of which are subsumed by the greater offense.

In Smith, at 615, this court stated that "[i]t is readily apparent that the legislature does not agree with our interpretation of legislative intent and rules of statutory construction set forth in Carawan. More specifically:"

> (1)The legislature rejects the distinction we drew between acts or acts. **Multiple punishment shall be imposed for separate offenses even if only one act is involved.**
>
> (2)The legislature does not intend the (renumbered) subsection 775.012(4)(a) be treated merely as an "aid" in determining whether the legislature intended multiple punishment. Subsection 775.012(4)(b) is the specific, clear, and precise statement of legislative intent referred to in Carawan as the controlling polestar. **Absent a statutory degree crime or a contrary clear and specific statement of legislative intent in**

> **the particular criminal offense statutes, all criminal offenses containing unique statutory elements shall be separately punished.**
>
> (3)Section 775.021(4)(a) should be strictly applied without judicial gloss.
>
> (4)By its terms and by listing the only three instances where multiple punishment shall not be imposed, **subsection 775.021(4) removes the need to assume that the legislature does not intend multiple punishment for the same offense, it clearly does not. However, the statutory element test shall be used for determining whether offenses are the same or separate.** Similarly, there will be no occasion to apply the rule of lenity to subsection 775.021(4) because offenses will either contain unique statutory elements or they will not, i.e., there will be no doubt of legislative intent and no occasion to apply the rule of lenity.

Smith, at 616 (footnotes omitted; emphasis added).

Petitioner asserts that based upon §775.021(4) and this courts decision in Smith, supra, respondent was properly convicted of both DUI manslaughter and vehicular homicide. As set forth above, the test for determining whether multiple convictions and sentences is proper is whether each offense requires proof of an element the other does not. §775.021(4)(a), Fla. Stat. (1991); Smith, at 616. The test is not whether each statute addresses "essentially the same evil." Carawan at 170. Where each offense does require proof of an element the other does not, multiple convictions and sentences are proper. §775.021(4), Fla. Stat. (1991); Smith, supra.

DUI manslaughter and vehicular homicide each require proof of an element the other does not. See §316.193, Fla. Stat. (1991); §782.071, Fla. Stat. (1991).

> . . . Vehicular homicide requires proof that the defendant operated a motor vehicle in a reckless manner and that there be a causal relationship between that recklessness and the victim's death. It does not require proof that the defendant was intoxicated. Reckless operation is not an element of the crime of DUI manslaughter. DUI manslaughter requires proof of simple negligence while operating an automobile under the influence of alcohol. Magaw v. State, 537 So. 2d 564 (Fla. 1989). A defendant could operate his vehicle while intoxicated, or to the extent that his normal faculties were impaired without driving in a reckless manner.

Murphy v. State, 578 So. 2d 410, 411 (Fla. 4th DCA 1991).

Furthermore, petitioner asserts that DUI manslaughter and vehicular homicide are not degrees of the same offenses as provided by statute. See §316.193, Fla. Stat. (1991); §782.071, Fla. Stat. (1991). Also, while vehicular homicide is a permissive lesser included offense of DUI manslaughter, it is not a necessarily lesser included offense of DUI manslaughter. Murphy, supra; Higdon v. State, 465 So. 2d 1309, 1313 (Fla. 5th DCA 1985), quashed, 490 So. 2d 1252 (Fla. 1986) (vehicular homicide has an element DWI manslaughter does not--reckless operation of a motor vehicle; "[w]hile becoming intoxicated might be a reckless act in itself it is not reckless operation of a motor vehicle; they are two different acts.").

Petitioner asserts that pursuant to §775.021(4) and this court's decision in Smith the intent of the legislature is clear: a defendant may properly be convicted of both DUI manslaughter and vehicular homicide. "Absent a statutory degree crime or a contrary clear and specific statement of legislative intent in the particular criminal offense statutes, all criminal offenses containing unique statutory elements shall be separately punished." Smith, at 616. As set forth above, DUI manslaughter and vehicular homicide each require proof of an element the other does not. Furthermore, there is nothing in either §316.193 or §782.071 indicating that the legislature did not intend a defendant to be punished for both DUI manslaughter and vehicular homicide. Had the legislature not intended dual convictions and sentences petitioner asserts that the legislature would have provided a clear statement of that intent as it did in §812.025, Fla. Stat. (1991). In §812.025, the legislature clearly stated that while a defendant may be charged with both theft and dealing in stolen property in connection with one scheme or course of conduct, "the trier of fact may return a guilty verdict on one or the other, but not both, of the counts."

Petitioner asserts that §775.021(4) did not simply override this court's decision in Carawan. It also overruled this court's previous method of applying §775.021(4) in the statutory construction analysis. Petitioner asserts that this court recognized this in its Smith decision. Smith, at 615-616. It is apparent from Houser and this court's discussion of Houser in Carawan, that Houser was decided by using the same analysis used

in Carawan. This is the same analysis which was overridden by the legislature in amending §775.021(4).

In Houser, this court stated that it was assumed that the legislature does no intend to punish the same offense under two different statutes. Houser, at 1196. This is no longer the assumption. In fact, it appears from this court's decision in Smith and §775.021(4) that the opposite is to be assumed, i.e., that the legislature does intend to punish the same offense under different statutes. As this court state in Smith, at 616, "subsection 775 021(4) removes the need to assume that the legislature doe not intend multiple punishment for the same offense." Petitioner asserts that in amending §775.021(4) and overriding Carawan the legislature likewise overrode this court's decision in Houser. The intent of the legislature is clear: "to convict and sentence for each criminal offense committed in the course of one criminal episode or transaction" where each offense requires proof of an element the other does not and where the offenses do not fall within the exceptions of §775.021(4)(b)1-3.

Petitioner asserts that the Fifth District erred in reversing respondent's conviction and sentence for vehicular homicide. The Fifth District by reversing respondent's conviction and sentence for vehicular homicide ignored the clear legislative intent as expressed in §775.021(4) and this court's decision in Smith. Unlike the decision of the Fifth District, the Fourth District in Murphy, supra, followed the clear legislative intent and found convictions for DUI manslaughter and vehicular homicide proper. Petitioner asserts that the court in

Murphy was correct; a defendant may properly be convicted of both DUI manslaughter and vehicular homicide. The decision below should be quashed.

## CONCLUSION

Based on the arguments and authorities presented herein, appellant requests this court quash the decision of the Fifth District and remand with directions to reinstate respondent's conviction and sentence for vehicular homicide.

Respectfully submitted,

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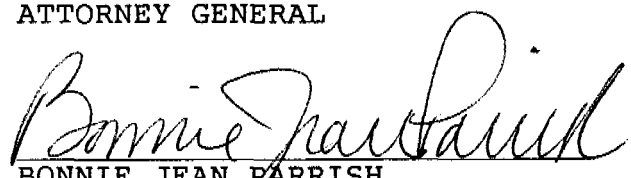

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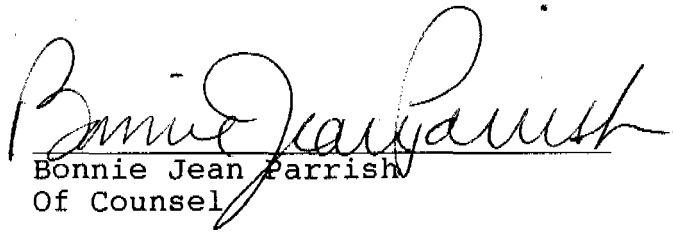
## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Initial Brief of Appellant has been furnished by delivery to Daniel J. Schafer, Assistant Public Defender, 112-A Orange Avenue, Daytona Beach, Florida 32114, this 22nd day of March, 1993.



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