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IN THE SUPREME COURT OF FLORIDA

CASE NO. 81,274

ALEX GOODWIN,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

****

ON APPEAL FROM THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA, FOURTH DISTRICT

****

RESPONDENT'S BRIEF ON THE MERITS

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

JOAN FOWLER
Senior Assistant Attorney General
Chief, Criminal Law,
West Palm Beach Bureau
Florida Bar # 330967

JOSEPH A. TRINGALI
Assistant Attorney General
Florida Bar #134924
1655 Palm Beach Lakes Blvd.
Suite 300
West Palm Beach, FL 33401-2299
Telephone: (407) 688-7759

Counsel for Respondent

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PRELIMINARY STATEMENT

Respondent was the prosecution in the trial court and the appellee in the District Court of Appeal, Fourth District.

In the brief, the parties will be referred to as they appear before this Honorable Court except that the Respondent may also referred to as the State.

The following symbols will be used:

"R" Record on Appeal

"AB" Appellant's Initial Brief

STATEMENT OF THE CASE

Respondent accepts the Statement of the Case presented in the Initial Brief of Petitioner as an accurate recital of the procedural history of the case at bar.

STATEMENT OF THE FACTS

Respondent accepts the Statement of the Facts presented in the Initial Brief of Petitioner, subject to the following additions, corrections or modifications, to wit:

Gene Detuscan, the State's toxicologist, never tesified that Petitioner's blood alcohol level was .084 percent when he entered Club Heat. He said that _if_ Petitioner had consumed all three ounces of rum at the Club, _then_ his blood alcohol level could have been as low as .08 percent at the time he entered the Club (R 1590-91).

Mr. Detucscan further testified that based on his calculations, Petitioner's blood alcohol level was between .099 and .12 percent at the time he entered Club Heat (R 1566, 1569); and .12 to .137 percent at the time Petitioner struck the victim with his automobile (R 1572).

SUMMARY OF THE ARGUMENT

I

Florida Statute 775.021(4)(b) (1988) clearly spells out the intent of the legislature. Accordingly, this Court's "refusal" (in Houser v. State) to assume that the legislature did not intend to punish the same crime under two or more statutes must be revisited. On a strict Blockburger analysis, the crimes of vehicular homicide and unlawful blood alcohol level mansalughter do not present a double jeopardy problem. The trial court and the Fourth District Court of appeal did not err in finding that Petitioner could be convicted of both.

II

The trial court properly denied Petitioner's motion for judgment of acquittal. The blood test was properly and timely taken. The toxicolgist's conclusions are matters of weight of the evidence, which is within the province of the jury.

III

The trial court properly instructed on flight as the law existed prior to Fenelon. Even if Fenelon is applied retroactively, any error at bar is harmless.

ARGUMENT

POINT I

THE TRIAL COURT DID NOT ERR IN ADJUDICATING AND SENTENCING PETITIONER FOR BOTH VEHICULAR HOMICIDE AND UNLAWFUL BLOOD ALCOHOL LEVEL MANSLAUGHTER ARISING FROM A SINGLE DEATH

In his first point on appeal, Petitioner argues that the trial court erred in adjudicating and sentencing him him for both vehicular homicide and unlawful blood alcohol level manslaughter, and that the Fourth District Court of Appeal likewise erred in upholding both convictions. In support of his argument, Petitioner contends that in relying on Murphy v. State, 578 So. 2d 410 (Fla. 4th DCA 1991), the District Court "overlooked" the fact that the rationale of Houser v. State, 474 So. 2d 1193 (Fla. 1985) was based "simply on the fact that DWI manslaughter is 'squarely within the scope of this state's regulation of homicide.'" In response, Respondent resepctfully points out that Petitioner's argument overlooks the fact that Houser, like Carawan v. State, 515 So. 2d 161 (Fla. 1987), which followed it, was decided prior to the passage of §775.021(4)(b) (1988), the law which Petitioner dubs the "anti-Carawan" statute.

In Houser, this Court pointed out that using the analysis laid down in Blockburger v. United States, 284 U.S. 299, 51 S. Ct. 180, 76 L. Ed. 306 (1932), the crimes of vehicular homicide and DWI manslaughter are separtate crimes. This Court then went on to say:

> Blockburger and its statutory equivalent in section 775.024(1) Fla. Stat. (1983), are only tools of statutory interpretation which cannot contravene the contrary intent of the legislature. (citations omitted) And [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. (citation omitted) This assumption should apply generally to statutory construction. 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.

Houser, id., at 1196, emphasis added.

This Court's refusal to assume that the legislature did not intend to punish the same crime under two or more statutes must be revisited in light of the clear legislative language which was passed following its Carawan decision and which is embodied in §775.021(4) Fla. Stat. (1988). In that regard, the decision of the Fourth District Court of Appeal in Murphy v. State, supra, is direcly on point. In Murphy, the Fourth District followed a strict Blockburger analysis and found that the crimes of vehicular homicide and DUI manslaughter were separate and distinct offenses which required different elements of proof. Then, after applying the statute [§775.021(4) (1988)], the Court concluded that the defendant could be convicted of both crimes.

In reaching its holding in the case at bar, the Fourth District noted conflict with two cases from the Fifth District, Chapman v. State, 604 So. 2d 942 (Fla. 5th DCA 1992) and Kurtz v. State, 564 So. 2d 519 (Fla. 5th DCA 1991). However, in each of those opinions the Fifth District specifically relied on Houser, supra. In fact, in Chapman, the Court admitted that, "the recent amendment to the rule of lenity, section 775.021(4)a, Florida Statutes (Supp. 1988), might support mulitple convictions

and sentences for an act of manslaughter resulting in a single death." Chapman, id., at 522.

Respondent respectfully suggests that the Fourth District took the better course in following its reasoning in Murphy, supra, when it held that the statute which was passed by the Florida legislature following the Carawan decision means what it says. At bar, there was no error in Petitioner's conviction for both vehicular homicide and unlawful blood alcohol level manslaughter. The trial court and the Fourth District should be affirmed.

POINT II

THE TRIAL COURT DID NOT ERR IN DENYING PETITIONER'S MOTION FOR JUDGMENT OF ACQUITTAL

Petitioner's second point on appeal is essentially a sufficiency of the evidence argument. In it, he posits that the State was unable to make out a prima facie case that his blood alcohol level was over .10 percent at the time he struck the victim. Petitioner bases this argument on the testimony of Gene Detuscan, the State's toxicologist, who, Petitioner claims, testifed that "the bollod alcohol level could have been below .10 at the time of the driving."

As Respondent pointed out in the Fourth District Court of Appeal, this argument is somewhat disingenuous. In fact, the toxicologist testified that based on his analysis (which discounted the alcohol in the last drink consumed by Petitioner) Petitioner's blood alcohol lever was between .12 and .15, but "most likely" .137 at the time of the incident (R 1569). Then, on cross examination, after an extended dialogue with defense counsel and in answer to a question which contained a number of assumptions which gave Petitioner the "benefit of the doubt" (R 1609), the toxicologist admitted that -- if those assumptions were correct -- Petitioner could have had less than .10 percent of alcohol in his blood at the time of the incident. However, as Respondent pointed out below, the flaw in Petitioner's argument is that the witness' testimony simply did not support the assumptions which defense counsel factored into his question in order to get the desired answer.

Clearly, the blood test at bar was given within a reasonable

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time after the incident. Miller v. State, 597 So. 2d 767 (Fla. 1992); Haas v. State, 597 So. 2d 770 (Fla. 1992). Once that determination is made, the Fourth District rightly held that the remaining question is one of credibility and weight of the evidence. Therefore, it would have been completely improper for the trial court to grant Petitioner's motion. Tibbs v. State, 397 So. 2d 1120 (Fla.), cert. granted, 454 U.S. 963, 102 S. Ct. 502, 70 L. Ed. 2d 378, affirmed, 457 U.S. 31, 102 S. Ct. 2211, 72 L. Ed. 2d 652 (1981). At bar, there was no error and the trial court should be affirmed.

POINT III

THE TRIAL COURT DID NOT REVESIBLY ERR IN GIVING A FLIGHT INSTRUCTION

In his final point on appeal, Petitioner argues that the trial court reversibly erred in giving a flight instruction over his objection.

Petitioner bases his argument on the holding of this Court in Fenelon v. State, 594 So. 2d 292 (Fla. 1992). However, in so doing, Petitioner overlooks two very important facts.

In the first place, in its Fenelon decision, this Court specifically said that the holding was to be applied prospectively. Petitioner attempts to raise the flight instruction issue to the level of a due process claim. However, the language of this court's decision makes it clear that it was making a policy decision for future cases:

> We are thus persuaded that the better policy in future cases where evidence of flight has been properly admitted is to reserve comment to counsel, rather than the court. (Citaions omitted).

Fenelon, id., at 295, emphasis added.

Secondly, and more importantly, Petitioner overlooks the fact that although in Fenelon this Court held that the giving of the flight instruction was error, it held that under the facts of the case, it was harmless error and affirmed the conviction. In the court below, Respondent pointed out that there was eyewitness testimony to support the finding that in running over the victim Petitioner was performing an intentional act (R 515, 862). That testimony, when coupled witht the evidence of the fight which occurred between Petitioner and

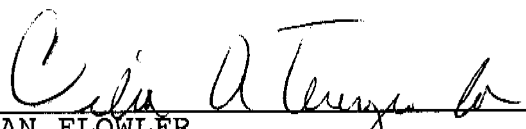
the victim earlier in the evening, was sufficient to prove intent. Accordingly, if the trial court erred, there is no reasonable possibility that the error affected the verdict, and the court should be affirmed on the basis of State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986).

CONCLUSION

Based on the foregoing arguments and citations of authority, Respondent respectfuly requests tha thte judgment and sentence of the trial court be AFFIRMED.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Atorney General
Tallahassee, Florida



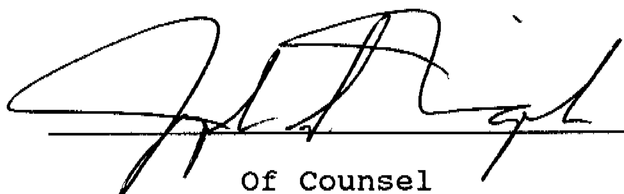
JOAN FLOWLER
Florida Bar No. 339067
Senior Assistant Attorney General
Chief, Criminal Law
West Palm Beach Bureau

JOSEPH A. TRINGALI
Assistant Attorney General
Florida Bar No. 134924
1655 Palm Beach Lakes Boulevard
Suite 300
West Palm Beach, FL 33401-2299
Telephone (407) 688-7759

Counsel for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the "Answer Brief of Respondent" was furnished by courier to: PAUL E. PETILLO Esq., Assistant Public Defender, Criminal Justice Building, 421 Third Street, 6th Floor, West Palm Beach, FL 33401, this 2nd day of April, 1993.



Of Counsel