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IN THE

SUPREME COURT OF FLORIDA

ALEX GOODWIN,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 81,274

PETITIONER'S REPLY BRIEF

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit
Criminal Justice Building
421 Third Street/6th Floor
West Palm Beach, Florida 33401
(407) 355-7600

Paul E. Petillo
Florida Bar No. 508438
Assistant Public Defender

Attorney for Alex Goodwin

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FLORIDA STATUTES

PRELIMINARY STATEMENT

Petitioner was the defendant in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, In and For Broward County, Florida, and the appellant in the District Court of Appeal, Fourth District. Respondent was the prosecution and appellee in the lower courts. The parties will be referred to as they appear before this Court.

The symbol "R" will denote Record on Appeal.

The symbol "SR" will denote Supplemental Record on Appeal (On February 3, 1992, the District Court granted Petitioner's unopposed motion to supplement the record with a transcript of Kari Kotarek's trial testimony which was inadvertantly omitted from the record on appeal).

STATEMENT OF THE CASE

Petitioner will rely on the Statement of the Case as found in his Initial Brief on the Merits.

STATEMENT OF THE FACTS

Petitioner will rely on the Statement of the Facts as found in his Initial Brief on the Merits.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN ADJUDICATING AND SENTENCING PETITIONER FOR BOTH VEHICULAR HOMICIDE AND UNLAWFUL BLOOD ALCOHOL LEVEL MANSLAUGHTER ARISING FROM A SINGLE DEATH

Respondent relies solely on § 775.021(4)(a), Fla. Stat. (Supp. 1988), the statutory codification of the Blockburger[1] test, and assumes that if this test is met then no further analysis need be done and dual convictions are permissible. Respondent completely fails to address the fact that an exception to the Blockburger test applies in this case: the "degree offenses" exception in § 775.021(4)(b)2, Fla. Stat. (Supp. 1988). This exception applies for the following reasons.

First, it should be observed that the statutory codification of the Blockburger test was enacted before passage of § 775.021(4), Fla. Stat. (Supp. 1988) (the so-called anti-Carawan statute),[2] and that the offenses of DUI/UBAL manslaughter and vehicular homicide have always met this test because each crime requires proof of an element the other does not. However, in Houser v. State, 474 So. 2d 1193 (Fla. 1985), this Court held that dual convictions were not permitted (notwithstanding application of the statutory Blockburger test) because the legislature did not intend to punish a single

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[1] Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932).

[2] The Blockburger test was codified in 1983. Ch. 83-156, Laws of Fla.

homicide under two different statutes.[3] Id. at 1197. This determination of legislative intent was based on the fact that unlawful homicide is a degree offense for which dual convictions have been traditionally prohibited,[4] and since DUI/UBAL manslaughter and vehicular homicide fall "squarely within the scope of this state's regulation of homicide," dual convictions were not intended by the legislature. Houser, supra, at 1196-1197.

No part of the foregoing analysis was changed by the passage of § 775.021(4), Fla. Stat. (Supp. 1988). In fact, if anything, the legislature in 1988 intended to preserve the holding and rationale of Houser when it added the "degree offenses" exception to § 775.021. Indeed, this Court must have recognized this in State v. Thompson, 607 So. 2d 422 (Fla. 1991), when it approved the District Court's use of the "degree offenses" exception *because it was consistent with Houser*. Thus, ironically, Petitioner's argument that dual convictions are impermissible has more statutory

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[3] In other words, the presumption of legislative intent provided by the Blockburger test was rebutted.

[4] As noted in the Initial Brief, this Court in Houser agreed with the Fifth District's decision in Vela v. State, 450 So. 2d 305 (Fla. 5th DCA 1984). In Vela, the District Court stated:

> The state argues that under a double jeopardy analysis, since each offense requires proof of an element the other does not (DWI/manslaughter requires proof of intoxication while vehicular homicide requires proof of reckless) the offenses are separate and distinct and Vela could be convicted and sentenced for each. However, we are dealing here with a degree *crime*, homicide, and it is "logically impossible to commit more than one degree crime as to one death." *Baker v. State*, 425 So.2d 36,60 (Fla. 5th DCA 1982) (Cowart, J., dissenting).

Vela, 450 So. 2d at 308 n. 2.

support now than it did before passage of § 775.021(4), Fla. Stat. (Supp. 1988).

For further argument, Petitioner will rely on his Initial Brief on the merits.

POINT II

THE TRIAL COURT ERRED IN DENYING PETITIONER'S MOTION FOR JUDGMENT OF ACQUITTAL ON THE UNLAWFUL BLOOD ALCOHOL LEVEL MANSLAUGHTER COUNT WHERE THE STATE'S EXPERT WITNESS, GENE DETUSCAN, TESTIFIED THAT PETITIONER'S BLOOD ALCOHOL LEVEL MAY HAVE BEEN LOWER THAN .10 AT THE TIME OF THE ACCIDENT

Respondent alleges that the testimony of the witnesses did not support the assumptions which defense counsel factored into his questioning of Detuscan on cross-examination. That isn't true. In fact, it was the prosecutor's questioning of Detuscan which was not supported by the testimony of witnesses. For instance, the prosecutor asked Detuscan to assume that Petitioner started drinking at the bar at 1:10 a.m. (R 1597), but no witness testified that that's when Petitioner started drinking. Kari Kotarek, the bartender, testified that Petitioner started drinking at 1:15 a.m. (SR 8-9,38), and this was the time that defense counsel asked Detuscan to use in his calculations. The prosecutor also asked Detuscan to assume that Petitioner left the bar at 1:50 a.m. (R 1569-1570), but no witness testified that that's when Petitioner left the bar. Kotarek testified that Petitioner left at 1:45 a.m. (SR 38), and Officer Louk testified that he was dispatched at either 1:48 a.m. or 1:50 a.m.[5] (R 1278, 1315).

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[5] Detuscan himself admitted that if the times of consumption he used were incorrect, then his results would be affected thereby (R 1597). Indeed, the state's incorrect hypothetical (starting to drink at 1:10, driving at 1:50) gave Petitioner an extra 10 minutes to absorb alcohol into his blood stream. This was a critical error because all of Detuscan's calculations were based on the assumption that it would take Petitioner 20 minutes to fully absorb one drink (R 1598-1599). Thus, the incorrect times of consumption given by the state put 1/2 of a drink more into Petitioner's blood stream at the time of driving than was actually there.

Respondent also alleges that defense counsel's questioning "contained a number of assumptions which gave the Petitioner the 'benefit of the doubt' (R 1609)." Presumably, Respondent is referring to defense counsel's use of Detuscan's lower figure of .084 upon entry to the bar. However, due process requires that Detuscan's lower figure be used because Petitioner must be given the benefit of every reasonable doubt. Hodge v. State, 315 So. 2d 507, 509 (Fla. 1st DCA 1975).

Detuscan's testimony on direct examination that Petitioner's blood alcohol level at the time of driving was between .12 and .15, but most likely .137, was based on erroneous times of consumption, and was based on a blood alcohol level at the time of entry to the bar which gave the state the benefit of the doubt. Detuscan's testimony on cross-examination that Petitioner's blood alcohol level may have been below the legal limit at the time of driving, was based on times of consumption which were supported by the testimony of the state's witnesses, and was also correctly based on a blood alcohol level upon entry to the bar which gave Petitioner the benefit of the doubt.

Detuscan's testimony on cross-examination rebutted the prima facie evidence of the blood alcohol reading taken after the accident and requires that this Court reverse and remand with directions to enter judgment of acquittal on the UBAL manslaughter count.

For further argument under this Point, Petitioner will rely on his Initial Brief on the Merits.

POINT III

THE TRIAL COURT ERRED IN GIVING A FLIGHT INSTRUCTION OVER PETITIONER'S OBJECTION

Respondent asserts that Petitioner's argument under this Point is based on Fenelon v. State, 594 So. 2d 292 (Fla. 1992), and that Fenelon is not to be applied retroactively. However, the giving of a flight instruction over Petitioner's objection was error under pre-Fenelon law. Shively v. State, 474 So. 2d 352, 354 (Fla. 5th DCA 1985); Lefevre v. State, 585 So. 2d 457 (Fla. 1st DCA 1991). Furthermore, even assuming it was not error to give the instruction under pre-Fenelon law, Fenelon must be applied retroactively to all similar cases pending on direct review in order to comport with the due process and equal protection guarantees of the United States and Florida Constitutions. Smith v. State, 598 So. 2d 1063, 1066 (Fla. 1991).

Respondent next argues that the error in instructing the jury on flight was harmless. Respondent's harmless error argument is based solely on the fact that there was "eyewitness testimony to support the finding that in running over the victim Petitioner was performing an intentional act (R 515, 862)." Respondent has overlooked the fact that Petitioner was convicted of vehicular homicide as a lesser of second degree murder, and UBAL manslaughter. In short, Respondent relies on testimony that the jury rejected in the first place.

Obviously, Respondent's harmless error analysis is wide of the mark and falls far short of proving beyond a reasonable doubt that the jury's verdict was not affected by the flight instruction.

State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). As pointed out in the Initial Brief on the Merits, Petitioner's defense was that he did not negligently or recklessly, or with an unlawful blood alcohol level, run over Brad Young. Rather, that a drunken Brad Young was recklessly "playing chicken" and jumped in front of Petitioner's car (R 1261,1271,1491,1505-1505). Thus, if Petitioner were innocent, he would have had no reason to flee the scene after the accident. However, Petitioner did flee, but his flight from the scene was consistent with his fear of the bouncers who had just roughed him up. Unfortunately, the jury was not instructed by the trial judge to infer fear of the bouncers from Petitioner's flight. Instead, the trial judge's instruction placed his official imprimatur on an inference of guilt from Petitioner's flight. This directly undercut Petitioner's theory of innocence and cannot be deemed harmless beyond a reasonable doubt, particularly when the prosecutor argued the instruction to the jury in closing (R 2168).

For further argument under this Point, Petitioner will rely on his Initial Brief on the Merits.

CONCLUSION

Based on the foregoing Argument and the authorities cited therein, Petitioner respectfully requests this Honorable Court to answer the certified question in the negative (Point I), reverse his conviction for UBAL manslaughter with instructions that a judgment of acquittal be entered thereon (Point II), and reverse his conviction for vehicular homicide for a new trial without the offending flight instruction (Point III).

Respectfully submitted,

RICHARD JORANDBY
Public Defender
15th Judicial Circuit of Florida
Criminal Justice Building
421 Third Street\6th Floor
West Palm Beach, Florida 33401
(407) 355-7600

Paul E. Petillo
Paul E. Petillo
Assistant Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to Joseph Tringali, and Joan Fowler, Assistant Attorneys General, 1655 Palm Beach Lakes Blvd, Third Street, West Palm Beach, Florida 33401 by courier this 9th day of April, 1993.

Paul E. Petillo
Attorney for Alex Goodwin